No. 90-589

In The

Supreme Court of the United States

October Term, 1990

BAXTER CHRYSLER PLYMOUTH, INC.,

and

JOHN MARKEL, INC., d/b/a
MARKEL FORD, et al.

and

JOHN KRAFT CHEVROLET, INC.,
d/b/a JOHN KRAFT CHEVROLET-ISUZU, INC.

and

STAN OLSEN PONTIAC, INC.,
d/b/a OLSEN AUTO WORLD and OLSEN FAMILY DISCOUNT CENTER,

Petitioners,

vs.

THE STATE OF IOWA, ex-rel.
THOMAS J. MILLER, Attorney General of Iowa,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

MARK A. WEBER
Attorney of Record
JAMES D. SHERRETS
SHERRETS & SMITH
Regency Professional Plaza
260 Regency Parkway Drive
Omaha, Nebraska 68114
(402) 390-0404

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. WHETHER THE IOWA DISTRICT COURT MAY CONSTITUTIONALLY ASSERT PERSONAL JURISDICTION OVER DEFENDANTS BASED UPON ADVERTISEMENTS PLACED IN A NEBRASKA NEWSPAPER WHICH HAS INCIDENTAL CIRCULATION TO IOWA RESIDENTS

II. WHETHER THE APPLICATION OF IOWA LAW TO NEBRASKA RESIDENTS WHERE NEBRASKA BEARS THE MOST SIGNIFICANT RELATIONSHIP TO THE SUBJECT MATTER OF THE ACTION IS A VIOLATION OF THE FULL FAITH AND CREDIT CLAUSE

III. WHETHER THE REGULATION OF NEBRASKA CREDIT ADVERTISING BY THE STATE OF IOWA IS A VIOLATION OF INTERSTATE COMMERCE

IV. WHETHER CONGRESS HAS PREEMPTED ANY ATTEMPT BY THE STATE OF IOWA TO ALLOW AN ACTION BY THE ATTORNEY GENERAL UNDER ITS TRUTH-IN-LENDING REGULATION WHERE CONGRESS EXPRESSLY PROVIDED THERE SHALL BE NO PRIVATE CAUSE OF ACTION

PARTIES TO THE PROCEEDING

The named appellant in the Supreme Court for the State of Iowa, and the only respondent here is Thomas J. Miller, Attorney General for the State of Iowa.

The named appellees in the Supreme Court for the State of Iowa, and the only petitioners here, are Baxter Chrysler Plymouth, Inc.[1], John Markel Ford, Inc. d/b/a Markel Ford[2], John Kraft Chevrolet, Inc., d/b/a John Kraft Chevrolet-Isuzu, Inc.[3], and Stan Olsen Pontiac, Inc., d/b/a Olsen Auto World[4]. Dean Rawson Nissan, Inc. was dismissed following the decision of the Iowa Supreme Court and therefore is not taking part in this Petition for Writ of Certiorari. The Supreme Court of Iowa affirmed the decision of the Iowa District Court dismissing the individual defendants for lack of personal jurisdiction, but reversed the decision as to the corporate defendants.

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[1] Baxter Chrysler Plymouth, Inc. has no parent companies, subsidiaries or affiliates.

[2] John Markel, Inc. has no parent companies, subsidiaries or affiliates.

[3] John Kraft Chevrolet Geo-Isuzu is an affiliate of John Kraft Chevrolet, Inc.

[4] Olsen Family Discount Center, Metro Motors, Olsen Dodge, Inc. d/b/a Olsen Family Discount Center and Olsen Auto World are affiliates of Stan Olsen Pontiac, Inc.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

The Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Iowa, entered May 23, 1990, and on which rehearing was denied June 20, 1990.

OPINIONS BELOW

The opinion of the Supreme Court of Iowa, No. 83/89-680, dated May 23, 1990 is attached as Appendix A.

Attached as Appendix B is the Order of the Supreme Court of Iowa, dated June 20, 1990 overruling Petitioner's Petition for Rehearing.

Attached as Appendix C is the order of the United States District Court for the Southern District of Iowa, Western Division dated July 13, 1988.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the First and Fourteenth Amendments and Article I, Section 8, Clause 3, and Article IV, Section 1 of the Constitution of the United States.

2. This case involves the following provisions of Federal Law.

15 U.S.C. § 1662. *Advertising of downpayments and installments.*

No advertisement to aid, promote, or assist directly or indirectly any extension of consumer credit may state:

(1) that a specific periodic consumer credit amount or installment can be arranged, unless the creditor usually and customarily arranges credit payments or installments for that period and in that amount.

(2) that a specified downpayment is required in connection with any extension of consumer credit, unless the creditor usually and customarily arranges downpayments in that amount.

May 29, 1968, 82 Stat. 158.

15 U.S.C. § 1664. *Advertising of credit other than open end plans.*

Exclusion of open end credit plans

(a) Except as otherwise provided in subsection (b) of this section, this section applies to any advertisement to aid, promote, or assist directly or indirectly any consumer credit sale, loan, or other extension of credit subject to the provisions of this subchapter, other than an open end credit plan.

Advertisements of residential real estate

(b) The provisions of this section do not apply to advertisements of residential real estate except to the extent that the Board may by regulation require.

Rate of finance charge expressed as annual percentage rate

(c) If any advertisement to which this section applies states the rate of a finance charge, the advertisement shall state the rate of that charge expressed as an annual percentage rate.

Requisite disclosures in advertisement

(d) If any advertisement to which this section applies states the amount of the downpayment, if any, the amount of any installment payment, the dollar amount of any finance charge, or the number of installments or the period of repayment, then the advertisement shall state all of the following items:

(1) The downpayment, if any.
(2) The terms of repayment.
(3) The rate of the finance charge expressed as an annual percentage rate.

May 29, 1968, 82 Stat. 158; Pub. L. 96-221, Title VI, § 619(b), Mar. 31, 1980, 94 Stat. 183.

15 U.S.C. § 1667. *Definitions.*

For purposes of this part –

(1) The term "consumer lease" means a contract in the form of a lease or bailment for the use of personal property by a natural person for a period of time exceeding four months, and for a total contractual obligation not exceeding $25,000, primarily for personal, family, or household purposes, whether or not the lessee has the option to purchase or otherwise become the owner of the property at the expiration of the lease, except that such term shall not include any credit sale as defined in section 1602(g) of this title. Such term does not include a lease for agricultural, business, or commercial purposes, or to a government or governmental agency or instrumentality, or to an organization.

(2) The term "lessee" means a natural person who leases or is offered a consumer lease.

(3) The term "lessor" means a person who is regularly engaged in leasing, offering to lease, or arranging to lease under a consumer lease.

(4) The term "personal property" means any property which is not real property under the laws of the State where situated at the time offered or otherwise made available for lease.

(5) The terms "security" and "security interest" mean any interest in property which secures payment or performance of an obligation.

Added Pub. L. 94-240, § 3, Mar. 23, 1976, 90 Stat. 257.

3. This case involves the following provisions of state law.

Iowa Code § 714.16

Iowa Consumer Credit Code § 537.1201

Iowa Consumer Credit Code § 537.1203

Iowa Consumer Credit Code § 537.3209

Iowa Consumer Credit Code § 537.6103

Iowa Consumer Credit Code § 537.6104

Iowa Consumer Credit Code § 537.6110

Iowa Consumer Credit Code § 537.6112

Iowa Consumer Credit Code § 537.6113

The text of these statutes is set forth in App. E, p. 37a.

Nebraska Revised Statutes, § 60-1411.03 (Reissue 1984) The text of this statute is set forth in App. F, p. 56a.

STATEMENT OF THE CASE

Markel Ford, John Kraft Chevrolet-Isuzu, Olsen Auto World, and Olsen Family Discount Center, (hereinafter "Dealers") are automobile dealerships located in Omaha, Nebraska. The Dealers placed advertisements in the *Omaha World Herald*,, a Nebraska newspaper. The Iowa Attorney General filed suit against the Dealers alleging false advertising under the Iowa Consumer Fraud Act, the Iowa Consumer Credit Code, and the Federal Truth-in-Lending Act.

The State maintained the advertising placed in the *Omaha World Herald* was false and misleading. The Dealers objected maintaining the ads fully complied with Nebraska law and received approval by the Nebraska Attorney General.

The suit was originally filed in the Iowa District Court for Pottawattamie County. Thereafter, the Dealers filed a removal petition in the United States District Court for the District of Iowa – Western Division, and immediately filed a motion to dismiss for lack of personal jurisdiction. The State in turn responded with a motion to remand for lack of subject matter jurisdiction.

The Honorable Donald E. O'Brien, United States District Court Judge, in an order dated July 12, 1988 granted the State's motion for remand finding a lack of subject matter jurisdiction existed, but not without opinion concerning the State's attempted action vis-a-vis federal law. Thereafter, the Dealers filed a Motion to Reconsider the Court's order of July 12, 1988. Judge O'Brien sustained and re-adopted the previous order with clarification in an order dated December 23, 1988 which is attached hereto as App. C, p. 20a.

Upon remand, the Dealers filed their Motion to Dismiss with the Iowa District Court for Pottawatamie County. Following oral argument, the Iowa District Court then granted the Dealers' Motion to Dismiss for Lack of Personal and Subject Matter Jurisdiction and Failure to State a Claim Upon

Which Relief May be Granted in its opinion dated April 6, 1989. The opinion of the Iowa District Court is attached hereto as App. D, p. 33a. The Iowa District Court determined that the Dealers lacked the necessary minimum contacts with the forum state as the circulation of the newspaper into Iowa constituted less that 2% of the total circulation and therefore an Iowa court could not constitutionally assert personal jurisdiction over the non-resident Dealers. This decision was based on the fact that the Dealers do not engage in any business in the State of Iowa. The District Court specifically found that any advertisements placed in the *Omaha World Herald* which happened to reach Iowa residents were incidental in nature, the Dealers had no control over the newspaper's distribution, and it was therefore insufficient to support the exercise of jurisdiction over these non-resident Defendants. (App. D, p. 35a)

The Attorney General of the State of Iowa (hereinafter "State of Iowa") appealed the order of the trial court to the Iowa Supreme Court. The Iowa Supreme Court affirmed the decision of the trial court dismissing the action for lack of personal jurisdiction as to the individual Dealers, but reversed the decision as to the corporate Dealers. Petitioners' Motion for Rehearing was denied June 22, 1990. Following the decision of the Iowa Supreme Court, a fifth defendant, Dean Rawson Nissan, Inc., withdrew from the lawsuit leaving four remaining corporate defendants to take part in this Petition for Certiorari.

REASONS FOR GRANTING WRIT

I. THE DECISION OF THE IOWA SUPREME COURT FINDING PERSONAL JURISDICTION EXISTS OVER PETITIONERS BASED UPON INCIDENTAL CONTACT WITH THE FORUM STATE IS VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND DIRECTLY CONTRARY TO THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES, FEDERAL COURTS, AND THE HIGHEST COURTS OF OTHER STATES.

"Jurisdiction under rule 56.2 [Iowa's long-arm statute] is coextensive with what is permitted by the due process clause

of U.S. Const. amend. XIV . . . [t]herefore, the only relevant issue is whether . . . personal jurisdiction over the non-resident defendant is consistent with due process." *Al-Jon, Inc. v. Garden Street Iron & Metal*, 301 N.W.2d 709, 711 (Iowa 1981). Any inquiry into whether a court has personal jurisdiction over the defendant must focus upon the extent of the contact by the defendant with the forum state. Due process requires minimum contact, the nature of which is such that "the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' ". *International Shoe Company v. Washington*, 326 U.S. 310, 316 (1945). It is the plaintiff's burden to plead and prove that such contacts exist. *Institutional Food and Marketing Associates, Ltd. v. Golden State Strawberries, Inc.*, 747 F.2d 971, 972 (8th Cir. 1984).

In making the due process inquiry, the Supreme Court of Iowa has stated that "[w]e apply the above standard [minimum contacts test] in light of five factors the Court of Appeals for the Eighth Circuit has distilled from adjudicated cases, the first three being the most important." *Larsen v. Scholl*, 296 N.W.2d 785, 788 (Iowa 1980).

Because due process is infringed unless the Dealers have had sufficient minimum contacts with Iowa, we must determine whether the contacts were sufficient in the present facts. In doing so, we consider the following five factors:

(1) the quantity of the contacts;

(2) the nature and quality of the contacts;

(3) the source and connection of the cause of action with those contacts;

(4) the interest of the forum state; and

(5) the convenience of the parties.

See Caesar's World, Inc. v. Spencer Foods, Inc., 498 F.2d 1176, 1180 (8th Cir. 1974) . . .

Recognizing that the Iowa Supreme Court has previously concluded that its long-arm statute confers jurisdiction "to the fullest extent permissible under the Due Process Clause of the Fourteenth Amendment", *Larsen v. Scholl*, 296 N.W.2d 785, 788 (Iowa 1980), it remains clear that the attempt to establish

jurisdiction by the Attorney General in this case extends beyond the reach of the Constitution of the United States. The due process clause, acting as an instrument of interstate federalism, may act to deprive the state of its power to render judgment. *World-Wide Volkswagen Corporation v. Woodson*, 444 U.S. 286, 294 (1980).

In *World-Wide Volkswagen*, this Court considered the issue of personal jurisdiction over car dealers, distributors, and manufacturers. The court found a New York car dealer was not subject to jurisdiction. The issue then turned to the question of whether there was jurisdiction over the manufacturer or distributor. The car dealer in *World-Wide Volkswagen* was excluded from jurisdiction because the dealer carried on no activity in the forum state whatsoever. The Court stated as to the dealer that "we find in the record before us a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction." *Id.* at 295. However, as to the manufacturer, the court stated that:

> if the sale of a product of a *manufacturer* or *distributor* such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.
>
> *Id.* at 297. (Emphasis added).

The present action is being asserted against four different car dealers, each of which is approximately ten miles from the Iowa border. None of the Dealers could be characterized as a manufacturer or distributor. Each dealer is simply one of many dealers in the various types of automobiles. For example, in the Omaha area there are approximately five Ford dealers, six Chevrolet dealers, and four Nissan dealers. Perhaps double that number of dealers, some over fifty miles away from Iowa, also advertise in the Omaha paper. Each of these dealers is but one small retailer among many, and should not be held accountable under the same standards as a large manufacturer or distributor.

This Court has carefully laid out the approach to be used in determining whether the assertion of personal jurisdiction in any given case is in accord with the requirements of due process. The "minimum contacts" analysis was first set forth in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). This approach has been reaffirmed and clarified by this Court in subsequent cases such as *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980); *Helicopteros Nacionales v. Hall*, 466 U.S. 408 (1984); *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984); and *Burger King v. Rudzewicz*, 471 U.S. 770 (1984); *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987).

However, there appears to be a need for further guidance from the Supreme Court. A number of state and federal courts have found the assertion of personal jurisdiction to be proper in instances where such assertion is in violation of the constitutional standards promulgated by this Court. The present case affords a unique opportunity for this Court to clarify what minimum contacts will support the exercise of jurisdiction over non-resident defendants. This case is an attempt by the Iowa Attorney General to impose Iowa law against Nebraska retailers who advertise their product in a Nebraska newspaper, which ads comply with both Nebraska and federal law. Consequently, the decision of the Iowa Supreme Court that personal jurisdiction over the corporate defendants is proper is in violation of the Dealers' Fourteenth Amendment Due Process rights and contrary to the decisions of the Supreme Court of the United States.

A. THE QUANTITY OF CONTACTS BETWEEN DEFENDANT AND THE STATE OF IOWA IS INSIGNIFICANT

Despite the assertion of the State of Iowa that petitioners place "almost daily" advertisements in the *Omaha World Herald* (which may, incidentally, reach Iowa residents) the petition merely cites 20 advertisements by Markel Ford, for example, over a nine-month period and advertisements on a Nebraska television station as the basis for jurisdiction. Council Bluffs is the only Iowa city of any size near Omaha, where

the Dealers are located. The petitions are attached hereto as Appendices G, H, I, and J.[1] Allegations that Iowa residents may have purchased a motor vehicle from any of the Dealers in Omaha are not relevant to any inquiry involving personal jurisdiction. It is the Dealers' own contact with the forum state which is at issue, not the extent of any contact by Iowa residents with the Dealers. *Aaron Ferrer & Sons v. Diversified Metal Corporation*, 564 F.2d 1211, 1215 (8th Cir. 1977); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

In accordance with the Eighth Circuit's test which is based upon the standards set forth by this Court, the essential element attendant to due process analysis is whether the defendant has "purposefully availed" himself of the privilege of conducting business in the State of Iowa. *Aaron Ferrer*, 564 F.2d 1211, 1215; *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980).

In this case, respondent would have the Court find purposeful availment only from incidental advertisement. It is not alleged:

1. That the Dealers maintain places of business or employ, or own realty in the State of Iowa;

2. That any contracts for the sale of automobiles are made in the State of Iowa;

3. That the Dealers have ever done business in Iowa or even ship, transfer or deliver cars into the State of Iowa;

4. That the Dealers advertise the sale of motor vehicles in any Iowa newspaper or radio station;

5. That the Dealers' advertisements are calculated to reach the Iowa market (only that Iowa residents may happen to purchase cars in Nebraska).

With his brief filed in the Iowa District Court, Respondent included an affidavit which states that there are 5,700 Sunday *Omaha World Herald* and 3,700 daily *Omaha World Herald* paid subscriptions in Council Bluffs. This affidavit is

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[1] Only one set of the Dealers ads, attached to the Baxter Chrysler Plymouth Petition is provided for the sake of brevity.

attached hereto as App. K p. 121a. Yet as represented by the *World Herald*, those totals are from an aggregate paid circulation which in November of 1987, was 301,916 Sunday *World Herald* and 224,269 daily *World Herald* newspapers. See App. K, p. 121a. In other words, 1.68% and 1.8%, respectively, of all newspapers circulated by the *Omaha World Herald* are distributed on a daily or Sunday basis into Council Bluffs. Indeed, because of the policy of the *Omaha World Herald*, it is impossible to prevent newspaper advertisements which are directed to the Omaha market from being circulated into Council Bluffs. In addition, due to cost factors, all advertisements are included in each edition of the *Omaha World Herald*, including those areas outside of the World Herald designated "Metro" area (Douglas and Sarpy Counties in Nebraska and Council Bluffs in Iowa). Although not alleged in his petition, Respondent's affidavit also states that two of the Dealers have listings in the Council Bluffs' telephone book. These listings are also not the result of any purposeful conduct on the part of the Dealers, but are placed by the national manufacturers such as Chrysler or Ford.

The numbers previously cited show the quantity of contacts is minimal. It is clear then that the Dealers' advertisements do not constitute "purposeful availment" for purposes of permitting the assertion of Iowa jurisdiction. Respondent merely relies upon two cases, *Gunner v. Elmwood Dodge, Inc.*, 506 N.E.2d 175 (Mass. 1987), and *Ex parte Chevrolet, Inc. (Re Emmie Wallace v. Pope Chevrolet, Inc., et al.)*, 555 So.2d 109 (Ala. 1989) for the proposition that such limited contact as that of the Dealers is sufficient to satisfy the minimum contacts test. However, both of these cases are inconsistent with holdings of the Supreme Court of the United States as well as various federal court decisions which are cited herein.

In *Gunner*, the Massachusetts Appeals Court concluded that a non-resident's "persistent" advertising campaign aimed at a market target in the forum state conferred long-arm jurisdiction. It was because of those contacts that the Massachusetts Court determined that the defendant was making an "additional effort to develop a Massachusetts market." The

court was quick to point out that had the advertisements been limited to those contained in a foreign newspaper and on a foreign television station, they might well have been considered "incidental contacts" for purposes of jurisdiction. Those cases reaching a different conclusion were distinguished by the *Gunner* court; each of which involved advertisement limited to media published or broadcasted outside of the forum state, just like the facts of the case at bar.

In *Pope Chevrolet*, the Supreme Court of Alabama held that a Georgia car dealer had sufficient minimum contacts with the State of Alabama to be subject to the personal jurisdiction of the Alabama state courts. The *Pope Chevrolet* case involved a suit instituted by an Alabama resident based upon fraud and breach of contract related to her purchase of a truck from the dealer. Plainly put, *Pope Chevrolet* suggests Atlanta newspapers and television stations will allow residents of four nearby states to sue in their forum if they receive this Atlanta newspaper. In this case there is no such injury, thus, the interest of Iowa in pursuing this action is much more limited than in *Pope Chevrolet*. *See* Argument "E," *infra*.

More appropriate to this Court's review is the analysis of *Herman Miller, Inc. v. MR Rents, Inc.*, 545 F. Supp. 1241, 1245 (W.D. Mich., 1982) which recognized that advertisements similar to those of Petitioners are merely incidental and not adequate to afford long-arm jurisdiction.

Herman Miller, Inc., was an action brought pursuant to Federal Trademark laws and state law. Plaintiff alleged that the defendant's advertising and selling constituted unfair competition and false advertisement and was contrary to Michigan law. The defendant filed a motion to dismiss for lack of personal jurisdiction.

The *Herman Miller* court denied jurisdiction. Defendant was an Illinois corporation with its sole place of business in Chicago. Plaintiff asserted that the defendant's infringement caused a tort action to occur in Michigan because of advertisements placed in the *Chicago Sun Times*, the *Chicago Tribune* and the *Chicago Magazine*. (The *Omaha World Herald* distributions in Iowa are also analogous.) The Michigan

paid circulation of the Chicago newspaper constituted 1.23% of their total daily circulation and 1.67% of their total Sunday circulation. In addition, *Chicago Magazine* had an average Michigan circulation of .87% of the total circulation (the Iowa circulation of the *Omaha World Herald* is less than 2% of the total circulation). Speaking for the Western District of Michigan, Judge Gibson held that such advertisement did not constitute a "purposeful availment", stating that:

> It would not be reasonable to require the defendant to defend in Michigan based on this limited Michigan circulation of Chicago area publications even if it is assumed that the offending advertisement appeared in each publication on a regular basis. . . . *the incidental circulation is far too tenuous a connection with Michigan to be the basis for personal jurisdiction.* (emphasis supplied)
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> *Id.* at 1245.

The lack of sufficient minimum contacts between Petitioners and Iowa precludes any finding of "purposeful availment" and accordingly the courts of Iowa may not constitutionally exercise personal jurisdiction in this case.

B. THE NATURE AND QUALITY OF THE DEALERS' CONTACTS WITH IOWA ARE INSIGNIFICANT AND THEREFORE INSUFFICIENT MINIMUM CONTACTS TO PROVIDE PERSONAL JURISDICTION OVER DEFENDANTS.

Petitioners are Nebraska corporations with their principal places of business in Omaha, Nebraska. There are no allegations that a sale or lease has been made in Iowa. It is suggested that Iowa residents from time to time may come to the Dealers in Omaha for the purpose of buying or leasing a car. However, it is well settled that "[u]nilateral acts by plaintiff alone will not suffice to bring a nonresident defendant within the personal jurisdiction of the forum state." *Hanson v. Denckla*, 357 U.S. 235, 250-54 (1958); *Tung v. American University of the Caribbean*, 353 N.W.2d 869, 871 (Iowa App. 1984).

In *Wines v. Lake Havasu Boat Manufacturing, Inc.*, 846 F.2d 40 (8th Cir. 1988) the buyers of boats sued the Arizona boat manufacturer for breach of warranties in Minnesota. The Circuit Court in holding that personal jurisdiction did not exist stated:

> "[t]he Due Process Clause ensures that a nonresident 'will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the 'unilateral activity of another party or a third person.' " *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 . . . *See also Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 . . . (1984).

Id. at 42.

The Eighth Circuit applied the same five part test that is used by the courts of Iowa for determining whether minimum contacts exist.

> The sole contact between Lake Havasu, this lawsuit, and Minnesota is Lake Havasu's advertising of its product in a nationally distributed trade publication which is circulated in Minnesota. It does not appear from the record, however, that Lake Havasu's advertising represents a purposeful availment of the benefits and protections of Minnesota law . . . Accordingly, Minnesota can not constitutionally assert jurisdiction on the basis of this advertising.

Id. at 43.

In *Golden State Strawberries*, 747 F.2d 448 (8th Cir. 1984), the Eighth Circuit noted that Missouri courts had interpreted its long-arm statute in a manner similar to that of Iowa. Nevertheless, the Circuit Court concluded that there were inadequate contacts by the defendant with the state to permit jurisdiction. The court observed that the defendant did not conduct business in Missouri. The defendant's involvement in Missouri was limited to phone conversations with and written correspondence to the plaintiffs. The court held that these "contacts" were not sufficient under the due process clause to justify an exercise of personal jurisdiction over the defendant.

In *Mountaire Feeds, Inc. v. Agro Impex S.A.*, 677 F.2d 651 (8th Cir. 1982) similar facts were addressed. The Eighth Circuit affirmed the decision of the district court granting the defendant's motion to dismiss for lack of personal jurisdiction. The plaintiff asserted that the defendant had sufficient minimum contacts with the forum state of Arkansas based upon the parties' extensive use of the facilities of interstate commerce such as the telephone and mail.

The Eighth Circuit found that "the use of arteries of interstate mail telephone, railway and banking facilities is insufficient, standing alone, to satisfy due process." *Id.* at 655. The court noted that the defendant did not maintain an office in Arkansas, nor did any sales representative or other employee ever enter Arkansas in connection with the sales contract.

Solicitation of business alone by happenstance in an adjoining state has never been viewed as sufficient contact to sustain the exercise of personal jurisdiction. It certainly should not be so viewed in this action where the Dealers have not transacted any business within the State of Iowa, nor is it even alleged that they entered into any contracts with an Iowa resident.

In *Cox Enterprises, Inc. v. Holt*, 678 F.2d 936 (11th Cir. 1982) a decision that cannot be reconciled with *Pope Chevrolet*, the court held that a Georgia newspaper which leased a room in Alabama as a drop point for independent distributors and an undetermined number of coin vending machines had not established minimum contacts for purposes of personal jurisdiction in Alabama.

The court held that the distribution was incidental and not a part of the paper's primary circulation area stating, " . . . [t]here is no evidence of an effort to exploit or penetrate the state market beyond making the paper available to a few readers in the state who have an interest in it . . . " *Id.* at 939. In this case, unlike the newspaper which was the primary publisher in *Cox*, the Dealers maintain absolutely no business enterprise or connection in Iowa.

In *Berks v. Red Mountain Ski Corporation*, 571 F. Supp. 500 (N.D. Ill. 1983) the parent of a child injured while skiing

at a Wisconsin ski resort attempted to bring a negligence action in Illinois against the resort. The court dismissed the case for lack of personal jurisdiction.

In *Berks* the ski resort's advertising contacts were more than mere incidental advertising in a foreign state. The ski resort maintained a booth at the 1982 Chicago Ski and Winter Show in Illinois, placed ads in an Illinois newspaper, broadcast its ski conditions on Illinois radio stations, and placed circulars in Illinois ski shops. These activities extend well beyond the barest of "contact" by the Dealers, yet jurisdiction was denied to an individual with a very real and personal injury.

It is inconceivable that an Iowa legislator could be allowed to dictate to a Nebraska corporation the content of ads placed by him in a Nebraska newspaper because an Iowan might see or respond to the ad. Under that theory, advertisers in the *Los Angeles Times* or the *New York Times* could be subject to the personal jurisdiction of every state. Such newspapers are widely distributed at newsstands all over the country, yet the advertisers do not place their ads with the intent to solicit business from anywhere but their locality. This is in contrast to other publications such as *USA Today* which are geared toward national distribution. In such publications it is common to find advertisers who do indeed intend to solicit business wherever the paper may be circulated. Such advertisements involve telephone services or computer products of national chains, but not local automobile dealerships. A car dealership is a business which is very local in nature. A Nebraskan who happens to see an advertisement for a car dealership in the *New York Times* is highly unlikely to travel to New York for the purpose of buying a car. The dealer expects only to solicit business in his vicinity, and certainly not to be held accountable for a speculative violation of another state's law, particularly when he is in compliance with his own state's laws.

C. THE RELATION OF THE CAUSE OF ACTION AGAINST DEFENDANTS HAS NOTHING TO DO WITH THE ALLEGED IOWA CONTACTS VIA THE OMAHA WORLD HERALD.

The respondent has argued that there is a direct connection between the cause of action and Petitioners' conduct and has discounted "newspaper" cases such as *Cox Enterprises, Inc. v. Holt*, 678 F.2d 936 (4th Cir. 1982). Nonetheless, the facts of this case warrant reliance on such case law.

The alleged contacts with the State are not a result of the Dealers' calculated attempts to reach the Iowa market, but that of the *Omaha World Herald*. The State argues that it is foreseeable that this Nebraska newspaper will reach a minute portion of the Iowa market and cites *World-Wide Volkswagen*, (444 U.S. 206) in support of the 'foreseeability' test. "Yet 'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process clause." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980); *Smalley v. Dewberry*, 379 N.W.2d 922, 923 (Iowa 1986).

In addition to foreseeability, there must be some action on the part of defendant by which it "purposefully avails itself of the privilege of conducting activities in the forum state." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

The Iowa Supreme Court's opinion in this case indicates the courts of Iowa persist in following a "stream of commerce" approach to the minimum contacts test. However, this approach has been specifically rejected by the United States Supreme Court in *World-Wide Volkswagen Corporation v. Woodson*, 444 U.S. 286 (1980) and *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987).

In *Svendson v. Questor*, 304 N.W.2d 428 (Iowa 1981), the Supreme Court of Iowa held that it had personal jurisdiction over a nonresident defendant who had placed a defective pool table into the stream of commerce. The court stated that "[i]t is generally accepted that when a manufacturer voluntarily places his product in the stream of commerce, the constitutional requirement of minimum contacts will be satisfied in

all states where the manufacturer can foresee that the product will be marketed." *Id.* at 431.

However, in *World-Wide Volkswagen*, this Court rejected the above approach and stated that

> the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.

Id. at 297. Thus, it was clearly wrong for the Iowa Supreme Court to base its opinion upon its holding in *Svendson* which applied an erroneous test in determining whether minimum contacts exist.

Any assertion of personal jurisdiction based upon such minimal contact as incidental circulation of an advertisement is contrary to the principle of due process and is unconstitutional. Construing personal jurisdiction as broadly as was done in *Svendson* is contrary to current Eighth Circuit holdings and contravenes due process guarantees recognized by this Court as well.

D. INCONVENIENCE TO DEFENDANTS IS GREATER THAN TO PLAINTIFF

Respondent has argued that the nonresident Dealers are not inconvenienced by having to defend this action in Pottawattamie County, Iowa. However, the truth of the matter is that they are greatly hardshipped by the maintenance of this matter in Iowa District Court. In order to defend this matter the Dealers initially sought advice of their Nebraska counsel. Indeed, this action was removed to federal court and pursued vigorously prior to remand. Now, however, in order for local Nebraska counsel to diligently continue its representation of their clients, local Iowa counsel must be retained by Iowa law. Travel from western Douglas County to Iowa to litigate this matter should not be understated. This action has therefore subjected petitioners to a double hardship. In addition, the test of jurisdiction based on the ads must take into account the fact that retailers much further into Nebraska make use of

the *Omaha World Herald* and would be required to travel hundreds of miles to defend a suit.

In addition to the above-mentioned inconvenience, Petitioner would simply refer the Court to arguments "E" and "II.", infra, with respect to the significant hardships faced due to the greater interests of Nebraskans and the problems faced by Nebraskans due to conflicts of laws with Iowa and Nebraska's most significant relationship to the subject matter of this action.

E. THE INTERESTS OF IOWA IN ALLOWING THIS CAUSE OF ACTION ARE MINIMAL IN COMPARISON TO THE FIRST AMENDMENT, DUE PROCESS, EQUAL PROTECTION, AND COMMERCE INTERESTS OF NEBRASKANS

Any coincidental impact the Attorney General receives by the indirect exposure of its residents to a Nebraska publication is greatly outweighed by the direct chilling effect which would impact commerce and freedom of the press in Nebraska. As mentioned, Respondent has yet to produce one injured party allegedly deceived by advertisements in the *Omaha World Herald.* On the other hand, there is no question what impact an adverse ruling would have upon Omaha car dealers and an Omaha newspaper which would be forced to alter their Nebraska advertising to placate the Iowa Attorney General. This of course is absurd.

In *Cox Enterprises, Inc. v. Holt,* 678 F.2d 936 (11th Cir. 1982) that court noted that stricter scrutiny is mandated where, as here, a newspaper is involved.

> First amendment considerations . . . require a greater showing of contact to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity . . . an expansion of jurisdiction to the limits permitted by due process in other types of cases would tend to have a "chilling" effect on the press because publishers would hesitate to distribute their newspapers in any areas other than those of their major circulation.

578 F.2d at 937-938.

The above rationale explains precisely the interests at stake here. If this case is not dismissed, Petitioners, who relied on the *World Herald*'s scrutiny of its ads may file a third-party claim for partial or full indemnity against the newspaper. The Respondent's argument suggests the Court has jurisdiction over the newspaper's customers even though it may not have jurisdiction over a necessary party. Interstate commerce concerns outweigh any state interest. The chilling effect alone that exercise of personal jurisdiction in this case would have greatly outweighed any alleged State of Iowa interest.

II. THE STATE OF IOWA MAY NOT SEEK TO APPLY IOWA LAW TO THE NEBRASKA DEALERS AS NEBRASKA BEARS THE MOST SIGNIFICANT RELATIONSHIP TO THE SUBJECT MATTER

Under the Full Faith and Credit Clause, U.S. Const. art. IV, § 1, the State of Iowa must give full faith and credit to the Nebraska statute which governs the advertising of motor vehicles for sale or lease. The Nebraska statute is attached hereto as App. F, p. 56a. However, the State of Iowa seeks to apply its own legislation, which is in conflict with that of Nebraska, to Nebraska residents.

As stated by the Supreme Court in *Pacific Employers Insurance Co. v. Industrial Accident Commission*, 306 U.S. 493 (1939),

> [f]ull faith and credit does not here enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it.
>
> *Id.* at 494.

It is clear that the State of Iowa is seeking to project its laws across its borders into Nebraska. The Dealers obtained the opinion of the Attorney General of the State of *Nebraska* regarding their advertisements placed in the *Omaha World Herald*, a *Nebraska* newspaper. In the attorney general's opinion, the ads of the *Nebraska* car dealers were proper under *Nebraska* law. Yet, in the present action, the State of Iowa

seeks to apply Iowa law to these advertisements and hold them violative of Iowa law. It is clear from the holdings of this Court that the State of Iowa has no such power. *See e.g., Magnolia Petroleum Co. v. Hunt,* 320 U.S. 430 (1943) ("Texas is without power to give extraterritorial effect to its laws.")

Where, as here, there is a conflict between the laws of two states, the courts of Iowa have adopted the approach of the Restatement (Second) of Conflict of Laws, § 6. Under this approach, the court will apply the law of the jurisdiction which has the "most significant relationship" to the issue presented. *Lindstrom v. Aetna Life Insurance, Co.,* 203 N.W.2d 623 (Iowa 1973).

As argued previously in this Petition, the State of Iowa has no significant interest in the maintenance of the present action. The State of Iowa has not produced a single individual that has been injured as a result of the Dealers' advertisements. However, the interests of the State of Nebraska are overwhelming. It would be extremely burdensome to force Nebraska retailers to comply not only with the laws of their state, but with those of Iowa as well. If this were held to be the case, Nebraska retailers could be held to be subject to the laws of any state where a copy of the *Omaha World Herald* happened to come to rest. Viewing the impact the Iowa Supreme Court's decision will have upon Nebraska's laws, commerce, and the constitutional guarantees of Nebraskans, it is clear that Nebraska has the "most significant relationship" to the subject matter of this action.

III. THE STATE COURTS OF IOWA LACK SUBJECT MATTER JURISDICTION OVER THIS ACTION

A. REGULATION OF NEBRASKA CREDIT ADVERTISING BY THE IOWA ATTORNEY GENERAL VIOLATES INTERSTATE COMMERCE

The Iowa Attorney General is without authority to dictate to a Nebraska business the manner in which it engages in interstate commerce. It is generally accepted that a state may

constitutionally impose burdens on such commerce only if the following criteria are met:

> 1. There is sufficient local interest in the matter being regulated and the regulation is a *reasonable* exercise of its police power;
>
> 2. There is no discrimination against interstate commerce; and
>
> 3. There is no disruption of any required uniformity in the regulation of interstate commerce.

Head v. New Mexico Examiners, 374 U.S. 424 (1963).

Advertising regulation has always been held to be unconstitutional when applied to interstate commerce in those areas where it represented an unreasonable interference with interstate commerce because of the need for uniform regulation. *Aldens v. Israel Packell*, 524 F.2d 38 (3d Cir. 1975) discussed the principles to be applied where there were conflicts between local and national interests. The Court went on to hold that the state's power to regulate interstate commerce was limited if:

> (1) the matter is one in which Congress had made its own choice of law; or
>
> (2) the area is one in which Congress has made no specific choice of law but
>
> (a) despite this inaction by Congress, the nature of the subject matter require[d] a uniform national rule, or
>
> (b) the choice of law made by the state discriminates against persons engaged in interstate commerce in favor of local interests, or
>
> (c) a non-discriminatory state choice of law, in an area where national uniformity not be essential, imposes a burden on interstate commerce in excess of any value attaching to the state's interest in imposing its regulation.

Id. at 45-46.

The court concluded that the national interest in the free movement of money, credit, goods and services outweighed

the valid local interest in restricting maximum interest rates on consumer loans and setting uniform contract rates for such transactions.

The *Aldens v. Israel Packell* interpretation was accepted by the Southern District of Iowa, Central Division in *Aldens Inc. v. Thomas J. Miller*, 466 F. Supp. 379 (1979). However, in that case too, the validity of the Iowa Consumer Fraud Act was construed only in relation to the state's regulation of usurious interest rates, the sole matter deferred to state regulation to by Congress in adoption of the Truth-in-Lending Act. (15 U.S.C. 1610(b)).

There is, however, no such deferral in the regulation of advertisement of matters governed by the Federal Truth-in-Lending Act. The attempted enforcement of state law against businesses engaged in interstate commerce is thus usurped by the Truth-in-Lending Act in matters of advertisement. The Truth-in-Lending Act is an expression of the need for the uniformity on such matters by the Act in such a manner to preclude local legislative pronouncements inconsistent with that Act.

B. CONGRESS HAS PREEMPTED STATE REGULATION OF CREDIT ADVERTISING THROUGH THE FEDERAL TRUTH IN LENDING ACT AND HAS FORECLOSED PRIVATE CIVIL RELIEF

As the Iowa Federal court noted in its opinion (attached hereto as App. C, p. 20a), the United States Supreme Court is using two different tests to determine federal question jurisdiction, the "Holmes approach", *Merrill Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986) and the "Brennan approach" of *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988).

Beginning with the analysis of *Merrill Dow Pharmaceuticals, Inc. v. Thompson*, petitioners were found to have improperly removed their cause to federal court. The crux of that court's determination was that presumably congress had determined no federal remedy should be afforded private citizens. Thus the matter lacked the requisite "substantial

element" to the cause of action necessary to invoke federal question jurisdiction. The case at bar is sufficiently distinct from *Thompson* to grant this court federal question jurisdiction.

First of all, there was no question that diversity existed. Secondly, only one of six counts present in the *Thompson* decision even involved a federal act (FDCA). Here, however, the *entire* complaint is based solely upon the Federal Truth in Lending Act ("TILA") and upon the purported allowance of Iowa's enforcement of the TILA.

The *Thompson* court in affirming the decision of the Sixth Circuit, concluded that since a jury could find a *violation* by defendants *not* based on federal law (as opposed to a *remedy* for plaintiffs *based* on federal law), plaintiff's causes of action did not depend entirely upon a question of federal law. Further, the *Thompson* court noted "the vast majority of cases brought under the general federal-question jurisdiction of the federal courts are those in which federal law creates the cause of action." *Thompson*, 478 U.S. at 808.

As the Iowa federal court noted, the purpose of Congress in enacting the TILA was to give certain private citizens relief in federal court for certain portions of the TILA. The court cited *Utley v. Varion Associates*, 811 F.2d 279 (9th Cir. 1987), which held that a private right of action must exist in the federal statute to raise federal question jurisdiction. While congress did not give states or state officials a cause of action in federal court, it did give citizens in certain instances a cause of action. *See* 15 U.S.C. § 1640 which is attached hereto as App. L, p. 124a. This conclusively satisfies *Utley* and *Thompson*. In addition, as the Iowa federal court has previously noted, this is also sufficient to grant pendent jurisdiction to the federal court. *See Schwab v. Erie Lackwana R.R.*, 303 Fed. S. 1398 (D.C. Pa. 1964). The federal court should have exercised jurisdiction over this matter.

In one instance Judge O'Brien noted that private civil relief under 15 U.S.C. § 1667(c) was specifically precluded due to the legislative history to that effect. Yet, at the same time, the court recognized a "colorable" question of federal preemption. (App. C, p. 27a, n. 4) In that regard the court

referred to *Metropolitan Life Ins. v. Taylor*, 107 S. Ct. 1542 (1987) which provides:

> [t]he policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that congress rejected in ERISA.
>
> *Id.* at 1547.

While the Iowa Federal court held that "under the logic of *Thompson*, 106 S.Ct. at 3229, Congress' refusal to create a private cause of action to assert [Part C and Regulation Z] violations prevents the court from exercising federal subject matter jurisdiction over *those* actions", preemption mandates federal jurisdiction. Even if this were true, the Court should have exercised jurisdiction over the three other cases. Unlike the federal act involved in *Franchise Tax Board*, 29 U.S.C. § 1144(b) (2) (A), the TILA provides no exception from federal preemption.

The only case recognized by the Federal court which specifically addressed TILA violations and remedies was *Jordan v. Montgomery Ward & Co.*, 442 F.2d 78 (8th Cir. 1971) In *Jordan*, a distinction was made only as to sections of the TILA where a private cause of action existed and sections where it did not. In fact, the court in *Jordan* noted where a private cause of action did not exist, Congress *intended* administrative enforcement:

> The language of section 108 (15 U.S.C. Sec. 1607) and the legislative history evidences that Congress intended that the Act be enforced primarily by administrative agencies. However, provision is made for the institution of a civil action by an aggrieved debtor under specific circumstances. (Citations omitted)
>
> > "[T]he bill specifically exempts credit advertising from the application of civil penalties. This exemption has been written into the bill by your committee to avoid the possibility that anyone, not a party to an actual transaction, seeing an advertisement not complying with the disclosure requirements of

> the bill would attempt to seek civil penalties." U.S. Code Cong. & Admin. News, p. 1976.

Jordan, 442 F.2d at 81.

The sole conclusion to be drawn from the *Jordan* analysis was that original subject matter jurisdiction over the credit advertising provisions of TILA may not be conferred upon private citizens or private attorneys general, but only upon federal administrative agencies. *Jordan*, 442 F.2d at 81.

The above conclusion merely begs the questions for which *Taylor* provides the answer. Since TILA provides administrative enforcement in some instances and private remedies in others, preemption exists. *Metropolitan Life Ins. v. Taylor*, 107 S. Ct. 1542, 1547 (1987); *see also Pilot Life Ins. v. Dedeaux*, 107 S. Ct. 1556 (1987). The Iowa Federal court recognized the existence of a preemption issue but added the issue need not be addressed in order to resolve the jurisdictional issue. This runs counter to *Williams* and *Taylor* which require an inquiry into preemption first. Unlike the state tax collection suit in *Franchise Tax Board*, no allowance for state law enforcement or remedies is made by congress under TILA.

Only after an analysis of whether preemption had occurred with regard to the TILA provisions cited in respondent's petition should the federal court have addressed whether state law or federal law applied, and then whether federal question jurisdiction necessarily existed. Indeed, due to the preemption issue present here, the answer to the question of the relief provided, both privately and administratively under TILA, necessarily implies federal jurisdiction.

The preemption doctrine simply destroys the *Thompson* analysis. This is especially so with regard to the alleged "leasing violations" under Part E and Regulation M which are actionable under 15 U.S.C. § 1640. The leasing advertising allegations, although to use the Iowa federal court's terms "relatively minor" (App. C, p. 9), become yet another basis for that court to exercise federal subject matter jurisdiction. Indeed, to adopt the "Thompson approach" of proceeding "with an eye to practicality and necessity...and with the nature of the federal interest at stake in mind", 106 S.Ct. 3234 and

3236 n.12, required that the federal court exercise jurisdiction and avoid state circumvention of Congressional intent. The Court must declare this a federal matter to be heard by a federal court in order to protect that intent.

Alternatively, the federal court sought to address the approach of *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988). This "alternative approach" theory requires a finding *either* that federal law creates the cause of action or that plaintiff's right to relief necessarily depends upon the resolution of a substantial question of federal law. *Id.* at 4627. While noting the "slippery" distinction between claims and theories, the federal court concluded plaintiff's claim did not depend solely upon federal law. (App. C, p. 11)

The "claim" the court recognized was a violation of the Iowa Consumer Fraud Act, Iowa Code § 714.16(2)(a) (1987) (as amended). This the court held was plaintiff's claim despite the fact that the *elements* of the claim consisted entirely of provisions and alleged violations of the TILA. The court held the citations of the provisions of the TILA and of § 714.16(2)(a) provide "alternative theories" for a solely state created cause of action. Petitioners submit the TILA and 714.16(2) cannot be alternate theories since a determination of alleged TILA violations is a prerequisite to proof of a violation under either. If this were not the case, Respondent simply could have dropped its list of alleged TILA violations and relied exclusively upon § 714.16(2)(a).

Nevertheless, even if the Court considers the citation of alleged federal and state violations as presenting alternative theories, this in and of itself does not preclude federal subject matter jurisdiction. *Chandler v. Riverview Leasing Inc.*, 602 F. Supp 157 (D.C. Pa. 1984).

Indeed, *Chandler* also recognized the common approach would be for a court first to allow removal (because subject matter jurisdiction necessarily exists) and only then decide whether to exercise jurisdiction over the pendent "state" claims. *Id.*

The error in the federal court's analysis was that it found merely because state law provided a state remedy for federal

TILA violations, federal law was only one theory, not necessary to the success of plaintiff's overall claim. As noted previously, even if the relief available is found solely under state law that has nothing to do with whether federal jurisdiction attaches. *See Avco Corp. v. Machinists*, 390 U.S. 557. In fact the Supreme Court noted in *Avco* that petitioner's action could be removed to federal court *even* though he had "undoubtedly" pleaded an adequate claim for relief under the state law and had sought a remedy available only under state law. *Id.*

The preemption issue must be kept in mind. *Christianson* presumes no preemption problem exists. *Christianson* involved alternative theories only one of which involved federal patent law interpretation by a federal court. Under the directives of *Metropolitan Life Ins. v. Taylor*, 107 S. Ct. 1542 (1987), notwithstanding the fact that state law may provide a cause of action, if a federal law preempts the area, the ordinary state complaint is converted into one stating a federal claim for purposes of the well pleaded complaint rule. *Id.* at 1547.

The Court must therefore address preemption under the alternative approach of *Christianson*. Under either alternative theory the answer is the same. Federal law allows the sole cause of action and accordingly its interpretation will determine whether respondent is entitled to relief.

CONCLUSION

The decision of the Supreme Court of Iowa that the Iowa courts may exercise personal jurisdiction over the Nebraska Dealers was in violation of the Dealers' constitutional right to due process as well as the constitutional standards of this Court. The requisite minimum contacts for a proper exercise of personal jurisdiction are not present in this case. The incidental circulation of the Nebraska newspaper into Iowa constitutes less than 2% of the total circulation of the newspaper and is the result of the paper's circulation policy, not any act of the Dealers.

The minimum contacts test was set forth by this Court to insure protection for important constitutional rights. However, many state and federal courts have decided the issue of personal jurisdiction in a manner inconsistent with the standards of the United States Supreme Court. Further clarification is therefore necessary to eliminate this conflict among the various courts as well as to prevent any further infringement of constitutional rights through the improper assertion of personal jurisdiction.

If the Iowa Supreme Court decision is allowed to stand, it will have a serious impact upon interstate commerce and the First Amendment rights of Nebraskans. It would give the Attorney General of the State of Iowa unprecedented power to regulate activities of other states by enforcing Iowa law beyond the borders of Iowa. Such regulation would be an impermissible burden upon interstate commerce, in addition to the chilling effect upon the First Amendment rights through the regulation by Iowa of a Nebraska newspaper. Where, as here, the laws of two states conflict, the law of the state with the greater interest in the subject matter should be applied. It is clear that Nebraska interests are superior in this case.

Not only do the state courts of Iowa lack personal jurisdiction in this matter, they also lack subject matter jurisdiction. This case should have remained in federal court and been dismissed. The State of Iowa's entire complaint is based solely upon federal law. Both the language and the legislative history of the Federal Truth-In-Lending Act indicate that enforcement and remedies are a federal concern. Civil remedies are afforded private citizens only in certain instances, and other matters are left to federal administrative enforcement.

The federal court should have considered the preemption issue before it remanded the case to state court. If there is preemption, federal question jurisdiction exists regardless of whether a proper state action is pled and relief exists under state law.

The Iowa courts do not have personal or subject matter jurisdiction in this action. This improper assertion of jurisdiction will have serious implications as it is in violation of the

Dealers' constitutional rights to due process. These implications also extend far beyond the individual Dealers, but concern the constitutional rights of all Nebraskans, and perhaps all U.S. citizens.

Wherefore, in view of the fact that the decision of the Iowa Supreme Court deprived Petitioners of Constitutional guarantees of the First and Fourteenth Amendments and violated interstate commerce and the Full Faith and Credit Clause, the Petitioners respectfully request this Court issue a Writ of Certiorari.

Respectfully submitted,

MARK A. WEBER
Attorney of Record
JAMES D. SHERRETS
SHERRETS & SMITH
260 Regency Parkway Drive
Omaha, Nebraska 68114
(402) 390-0404

Attorneys for Petitioners

APPENDIX A

IN THE SUPREME COURT OF IOWA

No. 83/89-680

(Filed May 23, 1990)

STATE OF IOWA ex rel. THOMAS J. MILLER, Attorney General of Iowa,

Appellant,

vs.

BAXTER CHRYSLER PLYMOUTH, INC.,

and

TALTON K. ANDERSON, In His Corporate Capacity as President of Baxter Chrysler Plymouth, Inc.,

---

JOHN MARKEL, INC.,

and

TIMOTHY S. MARKEL, In His Corporate Capacity as President of John Markel, Inc.

DEAN RAWSON NISSAN, INC.,

and

DEAN C. RAWSON, In His Corporate Capacity as President of Dean Rawson Nissan, Inc.,

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JOHN KRAFT CHEVROLET, INC. d/b/a/ John Kraft Chevrolet-Isuzu, Inc.,

and

JOHN E. KRAFT, In His Corporate Capacity as President of John Kraft Chevrolet, Inc.,

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STAN OLSEN PONTIAC, INC. d/b/a Olsen Auto World and Olsen Family Discount Center,

METROPOLITAN LINCOLN-MERCURY, INC. d/b/a Olsen Auto World, Olsen Family Discount Center, and Metro Motors,

OLSEN DODGE, INC. d/b/a Olsen Family Discount Center and Olsen Auto World,

STANLEY OLSEN, In His Corporate Capacity as President of Metropolitan Lincoln-Mercury, Inc., and Stan Olsen Pontiac, Inc., and

RONALD OLSEN, In His Corporate Capacity as President of Olsen Dodge, Inc.,

Appellees.

Appeal from the Iowa District Court for Pottawattamie County, Glen M. McGee, Judge.

The State, *ex relatione* the attorney general, appeals the dismissal for want of in personam jurisdiction of unlawful advertising claims brought against Nebraska automobile dealers. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Thomas J. Miller, Attorney General, Richard L. Cleland, Special Assistant Attorney General, and William L. Brauch, Assistant Attorney General, for appellant.

Gregory G. Barntsen of Smith, Peterson, Beckman & Willson, Council Bluffs, for appellee Dean Rawson Nissan, Inc., and Dean C. Rawson.

James D. Sherrets and Mark A. Weber of Sherrets & Smith, Omaha, Nebraska, and Sheldon Gallner of Gallner & Gallner, Council Bluffs, for all other appellees.

Considered by Harris, P.J., and Schultz, Carter, Snell, and Andreasen, JJ.

CARTER, J.

The State, *ex relatione* the attorney general (the attorney general), appeals from the dismissal of want of in personam jurisdiction of unlawful advertising claims brought against five Nebraska automobile dealers pursuant to the Iowa Consumer Fraud Act, Iowa Code § 714.16 (1987). The ten defendants are automobile dealerships and their respective corporate presidents whose businesses are located in Omaha, Nebraska.

These five separate actions were filed on September 4, 1987, in the Iowa District Court for Pottawattamie County. The attorney general alleges that the defendants caused advertisements to be circulated in this state which were deceptive and misleading and in violation of the Iowa Consumer Fraud Act, Iowa Code § 714.16 (1987), and the Iowa Consumer Credit Code, §§ 537.6104(2), 537.6110, 537.6112, and 537.6113 (1987). The actions seek to enjoin defendants from advertising, offering for sale or lease, attempting to sell or lease, or selling or leasing motor vehicles in violation of these statutes. The actions also seek to enjoin defendants from employing deceptive or unfair advertising practices and seek restitution for Iowa citizens of any monies wrongfully acquired by means of the allegedly unlawful advertising practices.

The defendants in each of the actions filed motions to dismiss, urging that the Iowa courts lacked in personam jurisdiction over them. The district court found that all of the defendants lacked sufficient contacts with the State of

Iowa for purposes of establishing in personam jurisdiction of an Iowa court to hear these claims. The court granted the motions to dismiss the actions. After considering the arguments of the parties on the jurisdictional issue, we affirm the district court's decision concerning the individual defendants but reverse its decision concerning the corporate defendants. As to the corporate defendants, we hold that in personam jurisdiction has been established with respect to the claims asserted.

The unlawful advertising claims against defendants are based on advertising in the *Omaha World Herald* by all five dealerships and television advertising over an Omaha television station by the defendant Baxter Chrysler Plymouth. In addition to these advertisements, all five dealerships have placed telephone listings in the U.S. West Yellow Page Directory for Council Bluffs, Iowa. Defendants Baxter Chrysler-Plymouth and Olsen Auto World accompanied their yellow page listings with large block advertisements in the Council Bluffs yellow pages.

The *World Herald* is a daily Nebraska newspaper serving the Omaha metropolitan area, including the City of Council Bluffs, Iowa, which is located directly across the Missouri River from Omaha.[1] The *World Herald* publishes several editions including a metropolitan edition,

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[1] Council Bluffs and Omaha comprise a Standard Metropolitan Statistical Area (SMSA), which is defined by the U.S. Census Bureau as "a large population nucleus, together with adjacent communities which have a high degree of economic and social integration with that nucleus." U.S. Department of Commerce, Bureau of the Census, *1980 Census of Population, General Population, Iowa* 17-5, A-4 (Aug. 1982).

which is distributed in the Omaha-Council Bluffs area, and an Iowa edition, which contains features specifically geared toward Iowans and is distributed to persons living in Iowa but outside the Omaha-Council Bluffs area. The advertisements which defendants placed in the *World Herald* were included in the metropolitan and Iowa editions which reach Iowa residents. Advertising policies at the *World Herald* are such that an advertiser cannot restrict its advertisements to just those versions of the *World Herald* distributed in Nebraska.

Although the parties are not in total agreement concerning the *World Herald*'s circulation statistics, our own review of the affidavits filed in support of and in response to the motion to dismiss suggests that at the times material to the attorney general's claims this newspaper had 221,091 daily subscriptions and 286,990 Sunday subscriptions. Of the daily subscriptions, 3700 were home delivered to residents of Council Bluffs, Iowa. Of the Sunday subscriptions, 5700 were home delivered to residents of Council Bluffs, Iowa, and over 27,000 were home delivered to subscribers residing in other Iowa locations. Daily subscriptions home delivered in Council Bluffs represented 1.8% of the paper's total subscriptions. Sunday subscriptions home delivered in Council Bluffs represented 2.0% of total subscriptions. Total Iowa home-delivered Sunday subscriptions represented approximately 11.5% of total Sunday subscriptions.

In seeking reversal of the district court's order, the attorney general argues that, by means of the broad language of Iowa Rule of Civil Procedure 56.2, the jurisdictional reach of the courts of this state has been expanded

to the widest parameters permitted under the due process clause of the federal constitution.[2] Recognizing that a state may only exercise jurisdiction over a nonresident defendant if that person has maintained "certain minimum contacts" with a forum state, the attorney general urges that defendants' contacts with this state have been substantial and are sufficient to satisfy the due process limitations on in personam jurisdiction.

The attorney general's argument emphasizes the fact that the defendants advertise on an almost daily basis in both the metropolitan edition (circulated in the Council Bluffs area) and the Iowa edition of the *World Herald*. This argument contends that advertising in a publication with the knowledge that it is regularly disseminated to subscribers in a particular state is an affirmative act to advertise in that state. From this premise, it is urged that, every time a copy of the *World Herald* which contains an advertisement by one of the defendants is sold to an Iowan in Iowa, that event constitutes a separate contact by that defendant with the State of Iowa. Considering only the Sunday edition of the *World Herald*, this adds up to 1,722,448 contacts per year. The attorney general urges that based on these figures defendants' contacts with the State of Iowa are substantial.

The defendants seek to uphold the district court's ruling on the ground that the mere likelihood that the advertisements placed in the Omaha newspaper will find their way into Iowa is insufficient to provide the requisite

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[2] Each of the defendants was served personally in the State of Nebraska pursuant to Iowa Rule of Civil Procedure 56.2.

minimum contacts for in personam jurisdiction. They have not, defendants urge, purposefully availed themselves of the privilege of conducting activities within the State of Iowa thereby invoking the benefits and protections of its laws. Defendants assert that the *World Herald* is a third party whose Iowa activities are not attributable to its Nebraska advertisers for purposes of the attorney general's minimum-contact theory.

I. Scope of Review.

The standard of review for this type of case was discussed most recently in *Smalley v. Dewberry*, 379 N.W.2d 922 (Iowa 1986). The allegations made in the State's petitions and the affidavits submitted to the trial court, if uncontradicted, must be accepted as true. The plaintiff has the burden of establishing jurisdiction, but after a prima facie case has been established, the burden passes to the defendant to produce evidence to rebut or overcome the prima facie showing. The trial court's findings have the force and effect of a jury verdict, however, the court is not bound by the trial court's application of legal principles or conclusions of law. *Smalley*, 379 N.W.2d at 924 (quoting *Svendson v. Questor Corp.*, 304 N.W.2d 428, 429 (Iowa 1981)); *see also Berkeley Int'l Co. v. Devine*, 289 N.W.2d 600, 602 (Iowa 1980).

II. Jurisdiction Over Corporate Defendants.

A state may exercise jurisdiction over nonresident defendants under the due process clause of the fourteenth amendment only if the defendant has certain

"minimum contacts" with the forum state. *See International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945). The defendants must have sufficient contacts such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Id.* at 316, 66 S. Ct. at 158, 90 L. Ed. at 102.

In *Smalley*, this court indicated that under *International Shoe* and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980), the jurisdictional inquiry centers on five factors:

1. the quantity of the contacts;
2. the nature and quality of those contacts;
3. the source and connection of the cause of action with those contacts;
4. the interest of the forum state; and
5. the convenience of the parties.

Smalley, 379 N.W.2d at 924, *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). The first three factors of this test are the most important, *Smalley*, 379 N.W.2d at 924; however, this court has held that the test "is not susceptible of mechanical application; rather, the facts of each case must be weighed to determined whether the requisite 'affiliating circumstances' are present." *Id.* (quoting *Kulko v. California Superior Court*, 436 U.S. 84, 92, 98 S. Ct. 1690, 1697, 56 L. Ed. 2d 132, 141 (1978)).

The attorney general argues that defendants' conduct and connections with the State of Iowa are such that they can reasonably anticipate being haled into court here.

This argument is tailored to *World-Wide Volkswagen Corp.*, where the Court stated:

> [I]f the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve *directly or indirectly*, the market for its products in other States, it is not unreasonable to subject it to suit in one of those States . . . .

Id. at 297-98, 100 S. Ct. at 567, 62 L. Ed. 2d 490 (emphasis added). The attorney general argues that defendants' numerous advertisements in Iowa, and the fact that their businesses are located in a market area which contains parts of Iowa, show that they have made efforts to directly serve the Iowa market. Therefore, it is reasonable, he asserts, to subject them to the jurisdiction of Iowa courts and they can reasonably anticipate being haled into court in Iowa.

The attorney general also relies heavily on *Svendsen v. Questor Corp.*, 304 N.W.2d 428 (Iowa 1981), a case involving a Missouri pool table manufacturer sued by an Iowa resident injured in Iowa when her pool table, purchased from an Omaha retailer, collapsed. This court found that the foreign defendant was subject to the personal jurisdiction of the court, and stated that the question before the court was whether the nonresident manufacturer, who indirectly through others served or sought to serve the Iowa market, was subject to the jurisdiction of Iowa courts.

Relying on *World-Wide Volkswagen*'s language regarding the efforts of a manufacturer to directly or indirectly

serve a market, we concluded in *Svendsen* that the allegations in plaintiff's petition satisfactorily demonstrated that the Missouri defendant, through its action in marketing its product via the Omaha retailer, sought to serve the Iowa market and was, therefore, subject to the jurisdiction of Iowa courts. 304 N.W.2d at 431.

This holding was reached even though the record in the case did not disclose the marketing territory of the foreign defendant. We stated that it was reasonable to infer that the defendant's commercial transactions resulted in more than insubstantial use and consumption in Iowa. *Id.* We relied in part in our *Svendsen* holding on the close proximity of the defendant's location in Missouri to the State of Iowa and on the fact that the pool table had been sold to the Iowa consumer in Omaha, Nebraska, in finding that it was "foreseeable" to the defendant that it would be haled into an Iowa court. *Id.*

The attorney general argues that the analysis in *Svendsen* dictates a similar result in the present case because the defendants here sought to serve the Iowa market through its newspaper advertisements, television advertisements, and yellow pages listings and advertisements. Moreover, he argues that, because defendants conduct their businesses in a major metropolitan area that encompasses cities in two states, and because they advertise in media that directly serves the area in both states, it is reasonable to infer that their commercial transactions result in more than insubstantial use and consumption in Iowa. The attorney general notes that, although the defendants are not manufacturers, they can foresee that the motor vehicles which they sell will be purchased by Iowans and used within this state.

The defendants argue that the State's reliance on *Svendsen* and its foreseeability analysis is inappropriate because it was decided prior to the *Smalley* decision. Defendants contend that in *Smalley* this court substantially modified the "stream of commerce theory" applied in *Edmundson v. Miley Trailer Co.*, 211 N.W.2d 269 (Iowa 1973). 379 N.W.2d at 924-25. They urge that *Svendsen*, like *Edmundson*, involved the question of foreseeability as to whether a Missouri manufacturer could have "reasonably anticipated" being haled in Iowa court. Because *World-Wide Volkswagen* and our *Smalley* holding have retreated from that doctrine, defendants contend that *Svendsen* is no longer appropriate authority.

We conclude that our *Smalley* holding in fact reaffirmed the *Svendsen* holding, stating "the manufacturer in *Svendsen* was indirectly, through others, seeking to secure a market in Iowa." 379 N.W.2d at 925. We find both *Svendsen* and *Smalley* to be consistent with the reasoning in *World-Wide Volkswagen*. In *Smalley* and *Edmundson*, "foreseeability" concerned the foreseeability to defendants that their products would eventually cause harm in foreign states, hundreds of miles from their market area. The defendants in these cases did not advertise in the forum state. In the present case, the claim is that the advertisements themselves are the unlawful act giving rise to the cause of action. Consequently, the "foreseeability" issue is foreseeability that the advertisements would be distributed in the Iowa market area. That such distribution would occur was a virtual certainty.

The attorney general argues that in deciding issues of in personam jurisdiction fewer contacts by a defendant with the forum state are required where the cause of

action arises from the defendant's activities within that state. This argument finds considerable support in the *International Shoe* case, where the court recognized that certain single or occasional acts in a state will suffice "because of their nature and quality and the circumstances of their commission," to subject the defendant to the jurisdiction of the state as to causes of action arising out of the act. *International Shoe*, 326 U.S. at 318-20, 66 S. Ct. at 159-60, 90 L. Ed. at 103-05. This principle was reaffirmed in *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223, 78 S. Ct. 199, 201, 2 L. Ed. 2d 223, 226 (1957).

More recently, in *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414, 104 S. Ct. 1868, 1872, 80 L. Ed. 2d 404, 411 nn.8, 9 (1984), the Supreme Court drew a distinction between "general" and "specific" jurisdiction based on the nature of the contacts with the forum state. This view was sharpened in *Burger King* where the court observed "[w]here a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Id.* at 472, 105 S. Ct. at 2182, 85 L. Ed. 2d at 540-41 (citations omitted) (footnote omitted). To this observation, the Court added "[a] State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors. . . . [I]t may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities . . . . " *Id.* at 473-75, 105 S. Ct. at 2182-83, 85 L. Ed. 2d at 541-42

(citations omitted). We find the principles espoused in *Burger King* to be equally applicable to efforts by the state itself to enjoin activities within the forum which contravene its laws.

We believe that the contacts which exist between the corporate defendants and the State of Iowa are clearly insufficient to subject them to suit in the Iowa courts on any cause of action to the same extent as Iowa domiciliaries. Their acts in advertising within this state are sufficient, however, to render them amenable to suit here in an action which seeks to halt that advertising on the ground that it is unlawful. The acts of advertising also establish in personam jurisdiction over these defendants for that portion of the attorney general's action which seeks to invoke the other sanctions which are provided in the relevant regulatory statutes for injuries which flow directly from the alleged unlawful advertising.

Basing in personam jurisdiction on the allegedly unlawful advertising carried on in the forum state does not differ significantly in a constitutional sense from the single act tort jurisdiction which has been recognized in this state since the enactment of Iowa Code section 617.3 in 1963. *See* 1963 Iowa Acts ch. 325, § 1. This jurisdictional nexus not only finds support in *International Shoe, McGee,* and *Burger King,* but also in those decisions recognizing extended in personam jurisdiction in actions directed at activities which a state subjects to special regulation. *See, e.g., Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm'n,* 339 U.S. 643, 648-50, 70 S. Ct. 927, 930-31, 94 L. Ed. 1154, 1161-62 (1950) (upholding jurisdiction of Virginia court to issue cease and desist order against Nebraska company doing mail order insuring business in

Virginia); *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623, 627-28, 55 S. Ct. 553, 554, 79 L. Ed. 1097, 1099 (1935) (suit in Iowa to vindicate Iowa's interest in regulating sale of securities by New York resident).

III. Jurisdiction Over Individual Defendants.

The individual defendants, who are officers of the corporate automobile dealerships, urge that, irrespective of whether any basis exists for an Iowa court to exercise in personam jurisdiction over the corporate defendants, they are not subject to suit here under our holding in *ex rel. Miller v. Internal Energy Management Corp.*, 324 N.W.2d 707 (Iowa 1982). In that case, we concluded that the fiduciary shield doctrine is applicable with respect to determinations involving in personam jurisdiction over corporate officers as well as to the merits of the claims against those officers in their individual capacity.

We held in *Internal Energy Management* that under the fiduciary shield doctrine a nonresident corporate agent is not individually subject to the forum state's in personam jurisdiction if that individual's only contact with the forum is by virtue of his acts as a fiduciary of the corporation. *Id.* at 710-12. Our review of the papers submitted in support of and in resistance to the motion to dismiss convinces us that the district court's ruling was correct with respect to the individual defendants. The attorney general has failed to demonstrate how any of these persons performed acts in this jurisdiction other than the acts of the corporation with which they were associated.

IV. Subject Matter Jurisdiction.

The defendants also urge that the district court was without subject matter jurisdiction over this controversy. We find no merit in that contention. For purposes of this argument, we must treat subject matter jurisdiction as involving the power of the court to hear and decide cases of the general class to which the proceeding belongs. The Iowa District Court being a court of general jurisdiction is clearly empowered to hear cases brought by the attorney general to vindicate alleged violation of the regulatory statutes which give rise to the claims in the present case.

We note in this regard, however, that subject matter jurisdiction should not be confused with legislative jurisdiction, *i.e.*, whether a state may constitutionally apply the law of the forum in adjudicating the validity of transactions which took place in whole or in part in another jurisdiction, *see* Restatement (Second) of Conflict of Laws § 6, 9 (1971), or whether a state's choice of law rules permit application of its laws to a transaction which occurred in whole or in part outside of its borders. These are matters which go to the merits of the attorney general's claims and do not bear on in personam or subject matter jurisdiction of the court.[3]

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[3] In *Burger King*, the court observed:

> [W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable. Most such considerations usually may be accommodated through means short

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We have considered all arguments presented and conclude that the judgment of the district court should be affirmed with respect to its dismissal of the claims against the individual defendants. The district court's judgment is reversed with respect to those claims against the corporate defendants which seek to enjoin the allegedly unlawful advertising carried on in this state by those defendants and those additional claims based on injuries which flow directly from the alleged unlawful advertising. Costs of appeal are taxed one-half to the appellant and one-half to the appellees.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

(Continued from previous page)

> of finding [in personam] jurisdiction unconstitutional. For example, the potential clash of the forum's law with the "fundamental substantive social policies" of another State may be accommodated through application of the forum's choice-of-law rules.

471 U.S. at 477, 105 S. Ct. at 2184-85, 85 L. Ed. 2d at 543-44 (footnote omitted).

APPENDIX B

IN THE SUPREME COURT OF IOWA

No. 89-680

ORDER

(Filed June 20, 1990)

STATE OF IOWA ex rel. THOMAS J. MILLER, Attorney General of Iowa,

Appellant,

vs.

BAXTER CHRYSLER PLYMOUTH, INC.

and

TALTON K. ANDERSON, In His Corporate Capacity as President of Baxter Chrysler Plymouth, Inc.

JOHN MARKEL, INC.,

and

TIMOTHY S. MARKEL, In His Corporate Capacity as President of John Markel, Inc.,

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DEAN RAWSON NISSAN, INC.,

and

DEAN C. RAWSON, In His Corporate Capacity as President of Dean Rawson Nissan, Inc.,

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JOHN KRAFT CHEVROLET, INC. d/b/a John Kraft Chevrolet-Isuzu, Inc.,

and

JOHN E. KRAFT, In His Corporate Capacity as President of John Kraft Chevrolet, Inc.,

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STAN OLSEN PONTIAC, INC. d/b/a/ Olsen Auto World and Olsen Family Discount Center,

METROPOLITAN LINCOLN-MERCURY, INC. d/b/a Olsen Auto World, Olsen Family Discount Center, and Metro Motors,

OLSEN DODGE, INC. d/b/a Olsen Family Discount Center and Olsen Auto World,

STANLEY OLSEN, In His Corporate Capacity as President of Metropolitan Lincoln-Mercury, Inc., and Stan Olsen Pontiac, Inc., and

RONALD OLSEN, In His Corporate Capacity as President of Olsen Dodge, Inc.,

Appellees.

After consideration by the court, en banc, appellees' Petition for Rehearing in the above-captioned matter is hereby overruled and denied.

Done this 20th day of June, 1990.

THE SUPREME COURT OF IOWA

/s/ Arthur A. McGiverin
Arthur A. McGiverin
Chief Justice

Copies to:

James D. Sherrets
Mark A. Weber
Sherrets & Smith
101 South 108th Avenue
Omaha, Nebraska 68154

William L. Brauch
Assistant Attorney General
Consumer Protection Division

Hoover State Office Building
LOCAL

David Richter
222 S. Sixth Street
Council Bluffs, IA 51501

Martin Cannon
318 S. 19th Street
Omaha, Nebraska 68102

Mark Scherer
Schmid, Mooney & Frederick
11404 W. Dodge Road, Suite 7000
Omaha, Nebraska 68102

Robert Huck
Commercial Federal Tower
2120 S. 72nd Street
Suite 1250
Omaha, Nebraska 68124

Michael Gallner
803 Third Avenue
Council Bluffs, IA 51502

Raymond Pogge
P.O. Box. 1502
Council Bluffs, IA 51502

Gregory G. Barnsten
35 Main Place
P.O. Box 249
Council Bluffs, IA 51502

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
WESTERN DIVISION

(Filed Jul 13, 1988)

STATE OF IOWA ex rel. THOMAS J. MILLER, Attorney General of Iowa, Plaintiff, vs. STAN OLSEN PONTIAC, INC., d/b/a Olsen Auto World and Olsen Family Discount Center, et al., Defendants.	CIVIL NO. 87-93-W
and BAXTER CHRYSLER PLYMOUTH, INC., et al., Defendants.	CIVIL NO. 87-94-2-W
and JOHN MARKEL, INC., d/b/a Markel Ford, et al., Defendants.	CIVIL NO. 87-95-W

and	)	
JOHN KRAFT CHEVROLET, INC., d/b/a/ John Kraft Chevrolet- Isuzu, Inc., et al.,	)	CIVIL NO. 87-96-W
Defendants.	)	
and	)	
DEAN RAWSON NISSAN, INC., et al.,	)	CIVIL NO. 87-102-W
Defendants.	)	

These cases were removed by the defendants from state court and are now before this court on a motion to remand for lack of subject matter jurisdiction filed by the plaintiff and motions to dismiss for lack of personal jurisdiction filed on behalf of the defendants. These cases have consolidated in order to resolve these motions in a single proceeding. For the following reasons, the court grants the motion to remand and finds that it lacks subject matter jurisdiction to address the defendants' motions to dismiss.

Thomas Miller, the Attorney General of the state of Iowa, filed five separate actions against Nebraska car dealers in Iowa District Court for Pottawattamie County, Iowa, alleging that the dealers' advertisements violated "both the federal Truth-in-Lending Act and the applicable Iowa statutes." These ads were placed in the Omaha World-Herald, which is widely circulated on the Iowa side of the Missouri River, and on Omaha television

stations. In each case the Attorney General seeks a temporary and permanent injunction against the violations alleged.

The structure of each of the complaints filed in state court is similar, although the substance differs in certain respects. Because the complaints were filed in state court, the plaintiff made no attempt to plead a federal basis for jurisdiction. The jurisdictional paragraph of the complaints states that "[T]he Iowa district court has jurisdiction of this action pursuant to Iowa Code §§ 537.1201(1)(c), 537.1203, 537.6104(2) and 714.167, (as amended)". Iowa Code § 537 is the Iowa Consumer Credit Code, a derivation of the Uniform Consumer Credit Code, and section 714 is the Iowa Consumer Fraud Act. Various provisions of each Iowa statute provide the Attorney General with remedies to enforce each act. *See* §§ 537.6110, 537.6112, 537.6113, and 714.16.

The federal aspect of the plaintiff's complaint which the car dealers relied upon in removing these cases to federal court lies in the list of prohibitions which the defendants allegedly violated. Each complaint alleges that the defendants' advertisements violated portions of Part C of the federal Truth-in-Lending Act, 15 U.S.C. §§ 1601-1693, and of portions of Regulation Z, 12 C.F.R. § 226 (1987), which the Federal Reserve Board of Governors promulgated as a binding interpretation of certain provisions of the Truth-in-Lending Act (TILA). In three of the five cases, the complaints also allege specific violations of Part E of the amended version of the TILA, and of Regulation M, 12 C.F.R. § 213 (1987). The Attorney General claims that Iowa Code § 537.6104(2) authorizes him to enforce the federal TILA in state court in his

capacity as administrator of the Iowa Consumer Credit Code.[1] Every action described as a violation of a federal standard is also alleged to constitute a violation of section 714.16(2)(a) of the Iowa Consumer Fraud Act[2] and section 537.3209 of the Iowa Consumer Credit Code.[3]

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[1] Iowa Code § 537.6104(2) states that "the administrator may enforce the Truth-in-Lending Act to the fullest extent provided by law." Under section 537.6103, the Attorney General is the administrator. The court need not decide whether these state law provisions give rise to an implied cause of action to enforce the TILA, or simply confer authority upon the Attorney General to use any causes of action otherwise available under the TILA.

[2] Iowa Code § 714.16(2)(a) states in relevant part:

> The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertising of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.

[3] Iowa Code § 537.3209 states:

> 1. A seller, lessor, or lender shall not advertise, print, display, publish, distribute, utter or broadcast, or cause to be advertised, printed, displayed, published, distributed, uttered or broadcast in any manner, any false, misleading, or deceptive statement or representation with regard to the rates, terms or conditions of credit with respect to a consumer credit transaction.

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I. SUBJECT MATTER JURISDICTION

The defendants' removal petition asserted that this court has diversity jurisdiction because the plaintiff is a citizen of Iowa while the defendants are citizens of Nebraska. Attorney General Miller is proceeding in his official capacity, and for this reason this action must be treated as a suit by the State of Iowa. *Nuclear Engineering Co. v. Scott*, 660 F. 2d 241, 250-1 (7th Cir. 1981). It is well established that a state may not be considered as a "citizen" for purposes of determining diversity jurisdiction. *Moor v. County of Alameda*, 411 U. S. 693, 717 (1973); *Postal Telegraph Cable Co. v. State of Alabama*, 155 U. S. 482, 487 (1894). It follows that all of the parties who are citizens are citizens of Nebraska, so diversity does not exist.

The defendants' strongest argument is that federal question jurisdiction exists because the face of each of the plaintiff's complaints alleges violations of federal law. "The presence or absence of federal-question jurisdiction is governed by the 'well pleaded complaint rule,' which

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2. Advertising that complies with the Truth-in-Lending Act does not violate this section.

3. This section does not apply to the owner or personnel, as such, of any medium in which an advertisement appears or through which it is disseminated.

However, because paragraph 2 appears to create a defense for a defendant to assert rather than an additional element which the plaintiff must establish, it is not significant for jurisdictional puposes. *Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California*, 463 U. S. 1, 12 (1983).

provides that federal jurisdiction exists only where a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar v. Williams*, 107 S. Ct. 2435, 2429 (1987).

Behind this seemingly simple rule lies a convoluted body of judicial interpretations. Unfortunately, these decisions defy any attempt to create a single "test" for federal question jurisdiction. At present the Supreme Court is using two different approaches – the "Holmes approach" set out in Justice Stevens' opinion for the majority in *Merrill Dow Pharmaceuticals, Inc. v. Thompson*, 478 U. S. 804, 106 S. Ct. 3229 (1986), and the broader approach described by Justice Brennan in his opinions for the majority in *Christianson v. Colt Industries Operating Corp.*, 65 U.S.L.W. 4625 (U.S. June 17, 1988), and *Franchise Tax Board*.

This court has little choice but to apply each approach and hope that the results do not differ. Luckily, they do not; under each approach the court must find that it lacks federal question jurisdiction. Accordingly, this case was improvidently removed to federal court and must be remanded.

A.

In *Merrill Dow Pharmaceuticals, Inc. v. Thompson*, the Supreme Court considered whether federal question jurisdiction existed in a case in which a tort plaintiff alleged that a drug manufacturer was negligent per se under state law because it misbranded its product in violation of the federal Food, Drug and Cosmetic Act.

Federal law provided an essential element of the plaintiff's claim, but only state law provided the plaintiff with a cause of action to seek relief on the basis of that violation. The Supreme Court focused upon the failure of Congress to provide a private cause of action and the court's unwillingness to infer a private cause of action from the federal act in question:

> We simply conclude that the congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently "substantial" to confer federal-question jurisdiction.

106 S. Ct. 3236.

In enacting the federal TILA, Congress has created an express cause of action which *certain* private citizens can use to seek relief in federal court for violations of *certain* portions of the TILA. *See* 15 U.S.C. § 1640. Defendants rely upon this in seeking to distinguish this case from *Thompson*, but their argument does not withstand close scrutiny. Congress did not give states or state officials a cause of action to seek relief in federal court for violations of the TILA suffered by their citizens. At least one court has phrased the *Thompson* test in a way which would make this a critical distinction. *See Utley v. Varian Associates, Inc.*, 811 F. 2d 1279, 1284 (9th Cir. 1987) ("Only if the executive order provides Utley with a private right of action against Varian in federal court might his complaint raise a 'substantial, federal question permitting removal jurisdiction.").

Furthermore, Congress did not provide *any* private citizen with a cause of action to seek relief against advertisements which violate two of the three TILA provisions relied upon by the plaintiff. The plaintiff's complaints cite three sections of the TILA – §§ 1662, 1664 and 1667(c). Sections 1662 and 1664 – concerning credit advertising – were contained in Part C (previously called Chapter 3) of the TILA; section 1667(c) – concerning leasing advertising – was later added when Part E was enacted in 1976. As the Eighth Circuit recognized in *Jordan v. Montcomery Ward & Co.*, 442 F. 2d 78 (8th Cir. 1971), "it was the intent of the Congress not to provide private civil relief for violations of the credit advertising provisions [of Part C]." 442 F. 2d at 81. Indeed, the legislative history could not be more clear on this point:

> The bill specifically exempts credit advertising from the application of civil penalties. This exemption has been written into the bill by your committee to avoid the possibility that anyone, not a party to an actual transaction, seeing an advertisement not complying with the disclosure requirements of the bill would attempt to seek civil penalties.

H. Rep. No. 1040, 90th Cong., 2d Sess. (1968), reprinted in 1968 U. S. Code Cong. & Admin. News 1962, 1976.[4] This

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[4] The legislative history raises a colorable question of whether the state law provisions such as Iowa Code § 537.6104(2) have been preempted or must be interpreted as including the same Part C exemption in order to avoid a preemption challenge. On occasion, the Supreme Court has concluded that the preemptive force of a statute is so extraordinary that it "converts an ordinary state common law complaint

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language also prevents courts from implying a cause of action from any Part C provisions. *Jordan*, 442 F. 2d at 82. In two of the five cases, violations of Part C provisions (and violations of subdivisions of Regulation Z derived from Part C) are the only federal law violations described in the complaint. *See State of Iowa ex rel. Miller v. John Kraft Chevrolet*, 87-96-W; *State of Iowa ex rel. Miller v. Dean Rawson Nissan. Inc.*, 87-102-W. Under the logic of *Thompson*, Congress' refusal to create a private cause of action to assert these violations prevents the court from exercising federal subject matter jurisdiction over those actions.[5]

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into one stating a federal claim for purposes of the well-pleaded complaint rule." *Metropolitan Life Insurance Co. v. Taylor*, 107 S. Ct. 1542, 1547 (1987). Although the court recognizes the existence of a preemption issue, it need not address it to resolve the jurisdictional issue because any preemptive effect is not so powerful as to completely supplant the entire area of state law, *see Caterpillar v. Williams*, 107 S. Ct. at 2430, and because federal law does not provide a "superceding remedy replacing the state law cause of action." Utley, 811 F. 2d at 1287.

[5] The court recognizes that Congress intended to permit Part C prohibitions to be enforced in federal court by the Federal Trade Commission. *See* 15 U.S.C. § 1607; *Jordan*, 442 F. 2d at 81. If this were enough to support federal jurisdiction over suits by anyone seeking to enforce Part C, however, the outcome of the *Thompson* case would have been different, because the regulation involved in *Thompson* could also have been enforced in federal court by a federal agency. *See* 106 S. Ct. at 3244 (Brennan, J., dissenting).

Thompson is not as dispositive in the three cases in which the state alleges violations of the leasing advertising provisions in Part E and Regulation M, which are actionable by private citizens at least in theory under 15 U.S.C. § 1640. Congressional intent to permit or not to permit these three suits to proceed in federal court is less clear. However, the leasing advertising allegations appear to be a relatively minor part of these suits. Whether these leasing allegations are sufficient to support federal jurisdiction over each of the three actions is a difficult question, especially in light of the risk of inconsistent judgments which is inherent in keeping three suits while sending two nearly identical ones back to state court. None of the parties have asked for such an approach, even if the law may require it. The *Thompson* court emphasized that courts must apply the well-pleaded complaint rule "with an eye to practicality and necessity," 106 S. Ct. at 3234, and with the nature of the federal interest at stake in mind. *Id.* at 3236, n. 12. *See also Kravitz v. Homeowners Warranty Corp.*, 542 F. Supp. 317, 320 (E.D.Pa. 1982). The minor federal interest in having a federal court resolve the legality of the leasing advertisements is not great enough to outweigh the impracticality of keeping three cases and sending two back to state court. For these reasons the court does not believe the *Thompson* majority would find the presence of the leasing advertising allegations sufficient to raise a *substantial* federal question.

In its recent decision in *Christianson v. Colt Industries Operating Corp.*, the Supreme Court revisited the well-pleaded complaint rule while resolving a jurisdictional

dispute between the Federal Circuit and the Seventh Circuit over a patent case. After analogizing the appellate jurisdiction statute to the federal question jurisdiction statute, Justice Brennan quoted from his pre-*Thompson* opinion for the majority in *Franchise Tax Board:*

> A district court's federal question jurisdiction, we recently explained, extends over "only those cases in which a well-pleaded complaint establishes *either* that federal law creates the cause of action *or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.*" [Citation omitted], in that federal law is a necessary element of one of the well-pleaded claims.

56 U.S.L.W. at 4627 (emphasis added). It should be recalled that the Supreme Court's failure in *Thompson* to apply the underlined language led Justice Brennan to write a strong dissent, so his resurrection of this second form of federal question jurisdiction in *Christianson* was probably not an accident. Because *Christianson* is the Supreme Court's latest word, the court must at least consider whether the plaintiff's "right to relief" in each case "necessarily depends upon resolution of a substantial question of federal law."

In so doing, the court must remember Justice Brennan's slippery distinction between claims and theories. In *Christianson* the defendant argued that the plaintiff's antitrust claims arose under patent law because the plaintiff alleged that the defendant falsely asserted that plaintiffs were violating its trade secrets, when those trade secrets were not protected under state law because the defendant's patents were invalid under federal law. The court held that even if the invalidity of the patent was an

essential element of one of the plaintiffs' monopolization theories, it would not support jurisdiction because that theory was one of several alternative theories contained within each antitrust claim. Because success on the patent issue was therefore not *necessary* to the overall success of either antitrust claim, the claims did not "arise under" patent law.

In the present case, each complaint includes the following paragraph which appears following the list of alleged Truth-in-Lending Act violations:

> The practices set forth in [the previous paragraph] are deceptive and misleading, and therefore also violate the Iowa Consumer Fraud Act, Iowa Code § 714.16(2) (a) (1987) as amended.

The court believes that this paragraph shows that success on the plaintiff's federal theories is not necessary to the overall success of his claims against the car dealers. Rather, plaintiff has his choice of theories, some federal and some nonfederal, and as a matter of logic, he need not establish that federal law has been violated in order to establish that he has a right to enjoin each of the practices he complains of. Thus, even if Justice Brennan has retaken control of the law in this area, such a development would not change the outcome of this case.[6]

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[6] Defendants also assert that these cases fall within this court's jurisdiction under 28 U.S.C. § 1337 over "any act of Congress regulating commerce." However, the jurisdiction created by section 1337 does not extend beyond the limits of the ordinary federal-question jurisdiction statute. *Kravitz*, 542 F. Supp. at 318 n. 1.

II. PERSONAL JURISDICTION

Defendants have moved to dismiss these actions on the theory that no Iowa court – state or federal – has personal jurisdiction over them. They further assert that this court can dismiss these actions even if it finds that the plaintiff's motion to remand is meritorious. However, the authorities cited in support of this approach do not begin to support it. This court must grant the plaintiff's motion to remand because it lacks subject matter jurisdiction over this case, which also means that the defendants' initial action in removing this case to federal court was improvident. Because these cases are presently in the wrong court, this would be the wrong court to address the personal jurisdiction motion. Although it may be more efficient if this court were to address the motions filed here, considerations of efficiency cannot make up for an absence of jurisdiction. For these reasons, the court may not address the motion to dismiss, but leaves it to the Iowa district court to resolve the important questions raised by that motion on remand.

IT IS THEREFORE ORDERED that the plaintiff's motion to remand these matters to state court is granted.

July 12, 1988.

/s/ Donald E. O'Brien, Judge
Donald E. O'Brien, Judge
UNITED STATES DISTRICT COURT

APPENDIX D

IN THE IOWA DISTRICT COURT FOR
POTTAWATTAMIE COUNTY

THE STATE OF IOWA, EX REL., THOMAS J. MILLER, ATTORNEY GENERAL OF IOWA, Plaintiff, vs. DEAN RAWSON NISSAN, INC., and DEAN C. RAWSON in his corporate capacity as President of Dean Rawson Nissan, Inc. EQUITY NO. 58533	EQUITY NO. 58533 EQUITY NO. 58534 EQUITY NO. 58535 EQUITY NO. 58536 EQUITY NO. 58537 ORDER AND RULING ON MOTION TO DISMISS (Filed Apr. 7, 1989)
BAXTER CHRYSLER PLYMOUTH, INC., and TALTON K. ANDERSON in his corporate capacity as President of Baxter Chrysler Plymouth, Inc. EQUITY NO. 58534	
JOHN MARKEL, INC., d/b/a MARKEL FORD, and TIMOTHY S. MARKEL, in his corporate capacity as President of John Markel, Inc., Equity No. 58535	

JOHN KRAFT CHEVROLET, INC., d/b/a JOHN KRAFT CHEVROLET-ISUZU, INC.,

and

JOHN E. KRAFT, in his corporate capacity as President of John Kraft Chevrolet, Inc.,

EQUITY NO. 58536

****

STAN OLSEN PONTIAC, INC., ET AL.,

EQUITY NO. 58537

Defendants.

****

All of these cases were remanded to the Iowa District Court by the U.S. District Court for lack of subject matter jurisdiction. All defendants have filed motions to dismiss on the grounds that the Iowa District Court lacks personal jurisdiction and subject matter jurisdiction. These cases were consolidated for hearing on the motion, with Attorneys Joseph E. Thornton for Rawson, Attorney Michael G. Helms for Baxter, Attorney James D. Sherrets for Markel, Attorney Robert J. Huck for Kraft and Attorney Martin A. Cannon for Olsen present. Assistant Attorneys General William L. Brauch and Linda Thomas Lowe appeared for the plaintiff. The Court has considered the pleadings, affidavits, arguments and all briefs and finds as follows:

1. In this action, the Iowa Attorney General seeks injunctive and compensatory relief from the defendants, who are Nebraska car dealers, claiming their advertising in the Omaha World-Herald in 1987 is misleading and

deceptive, in violation of the Iowa Consumer Credit Code and the Iowa Consumer Fraud Act.

2. Defendants are residents of Nebraska, are Nebraska corporations and do business in Nebraska. No contracts for the sale of automobiles were made in Iowa. Defendants own no property in Iowa. Defendants do no business in Iowa, and defendants do not deliver cars into Iowa. No advertising is placed in Iowa newspapers or with Iowa radio stations.

3. Advertisements in the Omaha World-Herald are required to be identical in all of the seven editions as a matter of Omaha World-Herald policy. In 11/87 the paid circulation of the newspaper was 301,916 on Sunday and 224,269 for the daily, of which 5,700 Sunday and 3,700 daily are subscriptions in Council Bluffs, for a percentage of 1.68 the World-Herald is the only Omaha newspaper published, and to advertise to their principal market in Nebraska, they must advertise in the Omaha World-Herald, which incidentally reaches Iowa residents.

4. Plaintiffs' statistics show that the World-Herald Sunday sales are 288,779, and 33,124 sales are in Iowa, which is 11.5 percent of the total sales; that 27 percent of the Council Bluffs households receive the newspaper. Plaintiffs therefore contend that the defendants seek to serve the Iowa market, benefit from sales to Iowans and can reasonably anticipate being haled into an Iowa court.

5. The narrow question before the Court is whether or not defendants placing ads in a Nebraska newspaper which incidentally is circulated to Iowans is sufficient contact to give the Iowa Courts jurisdiction.

6. The Court has reviewed the various cases cited by counsel and bases its decision largely on *Smalley v. Dewberry*, 379 NW2d 922 (Iowa 1986) and applies the five factors set out therein. The Court is satisfied there is insufficient contact with Iowa to support the exercise of jurisdiction over these nonresident defendants.

Based on the foregoing, the Court sustains the motion to dismiss and now dismisses plaintiffs' petition at plaintiffs' cost in all five cases.

DATED this 6th day of April, 1989.

/s/ Glen M. McGee
GLEN M. MCGEE, JUDGE,
FOURTH JUDICIAL DISTRICT,
STATE OF IOWA

APPENDIX E

§ 714.16

CRIMINAL LAW

714.16 Consumer frauds

1. Definitions:

a. The term "advertisement" includes the attempt by publication, dissemination, solicitation or circulation to induce directly or indirectly any person to enter into any obligation or acquire any title or interest in any merchandise;

b. The term "merchandise" includes any objects, wares, goods, commodities, intangibles, securities, bonds, debentures, stocks, real estate or services;

c. The term "person" includes any natural person or his legal representative, partnership, corporation (domestic and foreign), company, trust, business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee or cestui que trust thereof;

d. The term "sale" includes any sale, offer for sale, or attempt to sell any merchandise for cash or on credit.

e. The term "subdivided lands" refers to improved or unimproved land or lands divided or proposed to be divided for the purpose of sale or lease, whether immediate or future, into five or more lots or parcels; provided, however, it does not apply to the leasing of apartments, offices, stores or similar space within an apartment building, industrial building or commercial building unless an undivided interest in the land is granted as a condition precedent to occupying space in said structure.

2. a. The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.

b. The advertisement for sale, lease or rent, or the actual sale, lease, or rental of any merchandise at a price or with a rebate or payment or other consideration to the purchaser which is contingent upon the procurement of prospective customers provided by the purchaser, or the procurement of sales, leases, or rentals to persons suggested by the purchaser, is declared to be an unlawful practice rendering any obligation incurred by the buyer in connection therewith, completely void and a nullity. The rights and obligations of any contract relating to such contingent price, rebate, or payment shall be interdependent and inseverable from the rights and obligations relating to the sale, lease, or rental.

c. It shall be unlawful for any person to advertise the sale of merchandise at reduced rates due to the cessation of business operations and after the date of the first such advertisement remain in business under the same, or substantially the same, ownership, under the same, or substantially the same trade name, or continue to offer for sale the same type of merchandise at the same location for more than one hundred twenty days.

d. (1) No person shall offer or advertise within this state for sale or lease, any subdivided lands without first filing with the real estate commission, true and accurate copies of all road plans, plats, field notes and diagrams of water, sewage and electric power lines as they exist at the time of such filing, provided such filing shall not be required for a subdivision subject to section 306.21 or chapter 409. Each such filing shall be accompanied by a fee of fifty dollars for each subdivision included, payable to the real estate commission.

(2) False or misleading statements filed pursuant to subparagraph 1 of paragraph "d" of this subsection or section 306.21 or chapter 409, and advertising, offers to sell, or contracts not in substantial conformity with the filings made pursuant to section 306.21 or chapter 409 are unlawful.

e. Any violations of chapter 123 or any other provisions of law by a manufacturer, distiller, vintner, importer, or any other person participating in the distribution of alcoholic liquor or beer as defined in chapter 123.

3. When it appears to the attorney general that a person has engaged in, is engaging in, or is about to engage in any practice declared to be unlawful by this section or when he believes it to be in the public interest that an investigation should be made to ascertain whether a person in fact has engaged in, is engaging in or is about to engage in, any such practice, he may:

a. Require such person to file on such forms as he may prescribe a statement or report in writing under oath or otherwise, as to all the facts and circumstances concerning the sale or advertisement of merchandise by such

person, and such other data and information as he may deem necessary;

b. Examine under oath any person in connection with the sale or advertisement of any merchandise;

c. Examine any merchandise or sample thereof, record, book, document, account or paper as he may deem necessary; and

d. Pursuant to an order of a district court impound any record, book, document, account, paper, or sample of merchandise that is produced in accordance with this section, and retain the same in his possession until the completion of all proceedings in connection with which the same are produced.

4. a. To accomplish the objectives and to carry out the duties prescribed by this section, the attorney general, in addition to other powers conferred upon him by this section, may issue subpoenas to any person, administer an oath or affirmation to any person, conduct hearings in aid of any investigation or inquiry, prescribed such forms and promulgate such rules as may be necessary, which rules shall have the force of law.

b. No information or evidence provided the attorney general by a person pursuant to subsections 3 and 4 of this section shall be admitted in evidence, or used in any manner whatsoever, in any criminal prosecution. If a criminal prosecution under the provisions of this section is initiated in a state court against a person who has provided information pursuant to subsections 3 and 4 of this section, the state shall have the burden of proof that

the information so provided was not used in any manner to further the criminal investigation or prosecution.

c. In any civil action brought pursuant to this chapter, the attorney general shall have the right to require any defendant to give testimony, and no criminal prosecution based upon transactions or acts about which he is questioned and required to give testimony shall thereafter be brought against such defendant.

5. Service by the attorney general of any notice requiring a person to file a statement or report, or of a subpoena upon any person, shall be made personally within this state, but if such cannot be obtained, substituted service therefore may be made in the following manner:

a. Personal service thereof without this state; or

b. The mailing thereof by registered mail to the last known place of business, residence or abode within or without this state of such person for whom the same is intended; or

c. As to any person other than a natural person, in the manner provided in the Rules of Civil Procedure as if a petition had been filed; or

d. Such service as a district court may direct in lieu of personal service within this state.

6. If any person fails or refuses to file any statement or report, or obey any subpoena issued by the attorney general, the attorney general may, after notice, apply to a district court and, after hearing thereof, request an order:

a. Granting injunctive relief, restraining the sale or advertisement of any merchandise by such persons;

b. Dissolving a corporation created by or under the laws of this state or revoking or suspending the certificate of authority to do business in this state of a foreign corporation or revoking or suspending any other licenses, permits or certificates issued pursuant to law to such person which are used to further the allegedly unlawful practice; and

c. Granting such other relief as may be required; until the person files the statement or report, or obeys the subpoena.

7. Whenever it appears to the attorney general that a person has engaged in, is engaging in or is about to engage in any practice declared to be unlawful by this section he may seek and obtain in an action in a district court an injunction prohibiting such person from continuing such practices or engaging therein or doing any acts in furtherance thereof. The court may make such orders or judgments as may be necessary to prevent the use or employment by a person of any prohibited practices, or which may be necessary to restore to any person in interest any moneys or property, real or personal which may have been acquired by means of any practice in this section declared to be unlawful including the appointment of a receiver in cases of substantial and willful violation of the provisions of this section.

8. When a receiver is appointed by the court pursuant to this section, he shall have the power to sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands

and tenements, books, records, documents, papers, choses in action, bills, notes and property of every description, derived by means of any practice declared to be illegal and prohibited by this section, including property with which such property has been mingled if it cannot be identified in kind because of such commingling, and to sell, convey, and assign the same and hold and dispose of the proceeds thereof under the direction of the court. Any person who has suffered damages as a result of the use or employment of any unlawful practices and submits proof to the satisfaction of the court that he has in fact been damaged, may participate with general creditors in the distribution of the assets to the extent he has sustained out-of-pocket losses. In the case of a partnership or business entity, the receiver shall settle the estate and distribute the assets under the direction of the court. The court shall have jurisdiction of all questions arising in such proceedings and may make such orders and judgments therein as may be required.

9. Subject to an order of the court terminating the business affairs of any person after receivership proceedings held pursuant to this section, the provisions of this section shall not bar any claim against any person who has acquired any moneys or property, real or personal, by means of any practice herein declared to be unlawful.

10. In any action brought under the provisions of this section, the attorney general is entitled to recover costs for the use of this state.

11. If any provision of this section or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions of applications

of the section which can be given effect without the invalid provision or application and to this end the provisions of this section are severable.

12. Nothing contained in this section shall apply to the owner or publisher of newspapers, magazines, publications or printed matter wherein such advertisement appears, or to the owner or operator of a radio or television station which disseminates such advertisement when the owner, publisher or operator has no knowledge of the intent, design or purpose of the advertiser; and provided, further, that nothing herein contained shall apply to any advertisement which complies with the rules and regulations of, and the statutes administered by the federal trade commission.

This section was not enacted as part of the Criminal Code but was transferred here from section 713.24, Code 1977.

PART 2. SCOPE AND JURISDICTION

537.1201. Territorial application

1. This chapter applies to:

a. A transaction, or acts, practices or conduct with respect to a transaction, if the transaction is entered into in this state, except that a transaction involving other than open end credit or acts, practices or conduct with respect to such a transaction shall not subject any person to damages or penalty under article 5 of this chapter, or administrative enforcement under article 6, part 1.

(1) If the buyer, lessee or debtor was physically located outside of this state, at the time the buyer, lessee or debtor signed the writing evidencing the transaction or made, in face-to-face solicitation, a written or oral offer to enter into the transaction,

(2) If the transaction or acts, practices or conduct with respect to the transaction were not in violation of law in the state in which the buyer, lessee or debtor was physically located, and

(3) If, with respect to charges and agreements, the person does not collect or enforce that transaction except to the extent permitted by this chapter.

b. A transaction, or acts, practices or conduct with respect to a transaction, if it is modified in this state, without regard to where the transaction is entered into, except that acts, practices, conduct, disclosures, charges or provisions of agreements not in violation of law in the state where they occurred or were entered into, shall not subject any person to damages or penalty under article 5 or administrative enforcement under article 6, part 1, if, with respect to acts, practices, conduct or disclosures, they occurred outside this state and before a modification in this state, and if, with respect to charges and agreements, they are not collected or enforced by that person except to the extent permitted by this chapter. A person shall not be required to obtain a license under section 537.2301, solely because the person modifies a transaction in this state.

c. Acts, practices or conduct in this state in the solicitation, inducement, negotiation, collection or enforcement of a transaction, without regard to where it

is entered into or modified; including, but not limited to, acts, practices or conduct in violation of sections 537.3209, 537.3210, 537.3311, 537.3501, article 5, parts 1 and 3, and article 7.

2. For the purposes of this section, a transaction is entered into or modified in this state if any of the following apply:

a. In a transaction involving other than open end credit:

(1) If the buyer, lessee or debtor is a resident of this state at the time the person extending credit solicits the transaction or modification, whether personally, by mail or by telephone, unless the parties have agreed that the law of the residence of the buyer, lessee or debtor applies, in which case that law applies.

(2) If the buyer, lessee or debtor is a resident of this state at the time the person extending credit receives either a signed writing evidencing the transaction or modification, or a written or oral offer of the buyer, lessee or debtor to enter into or modify the transaction.

(3) If the transaction otherwise has significant contacts with this state, unless the buyer, lessee or debtor is not a resident of this state at the times designated in subsection 2, paragraph "a", subparagraphs (1) and (2) and the parties have agreed that the law of the buyer's, lessee's, or debtor's residence applies. A person shall not be required to obtain a license under section 537.2301 solely because this chapter applies to a transaction pursuant to this subparagraph.

b. In an open and credit transaction:

(1) If the buyer, lessee or debtor is a resident of this state either at the time the buyer, lessee or debtor forwards or otherwise gives to the person extending credit a written or oral communication of the intention to establish the open end transaction, or at the time the person extending credit forwards or otherwise gives to the buyer, lessee or debtor a written or oral communication giving notice to the buyer, lessee or debtor of the right to enter into open end transactions with such person, unless the parties have agreed that the law of the residence of the buyer, lessee or debtor applies in which case that law shall apply.

(2) If the transaction otherwise has significant contacts with this state, unless the buyer, lessee or debtor is not a resident of this state at the times designated in subsection 2, paragraph "a", subparagraph (1) and the parties have agreed that the law of the buyer's, lessee's, or debtor's residence applies. A person shall not be required to obtain a license under section 537.2301 solely because this chapter applies to a transaction pursuant to this subparagraph.

c. In any credit transaction, if the parties have agreed that the law of the residence of the buyer, lessee or debtor applies and the buyer, lessee or debtor is a resident of this state at any time designated, with respect to a transaction other than open end, in subsection 2, paragraph "a", subparagraphs (1) and (2) or, with respect to an open end credit transaction, in subsection 2, paragraph "b", subparagraph 1.

3. For the purposes of this section, "modification" shall include, but not be limited to, any alteration in the maturity, schedule of payments, amount financed, rate of finance charge or other term of a transaction.

4. For the purposes of this chapter, the residence of a buyer, lessee or debtor is the address given by that person as the person's residence in a writing signed by the person in connection with a transaction until the person notifies the person extending credit of a different address as the person's residence, and it is then the different address.

5. Except as provided in subsection 1, paragraph "c", and subsection 6, a transaction entered into or modified in another jurisdiction is valid and enforceable in this state according to its terms to the extent that it is valid and enforceable under the laws of the other jurisdiction.

6. A provision of an agreement made by a buyer, lessee or debtor is invalid:

a. Which provides, if the buyer, lessee or debtor is a resident of this state at the times designated in subsection 2, paragraph "a", subparagraphs (1) and (2) and subsection 2, paragraph "b", subparagraph (1):

(1) That the law of another jurisdiction shall apply, except as provided in subsection 2, paragraph "a", subparagraph (1) and in subsection 2, paragraph "b", subparagraph (1).

(2) That the buyer, lessee or debtor consents to be subject to the process of another jurisdiction.

(3) That the buyer, lessee or debtor appoints an agent to receive service of process.

(4) That venue is fixed at a particular place.

(5) That the consumer consents to the jurisdiction of a court that does not otherwise have jurisdiction.

b. If a provision would negate subsection 1, paragraph "b".

7. The following provisions of this chapter specify the applicable law governing certain cases:

a. Section 537.6102 specifies the applicability of article 6, part 1.

b. Section 537.6201 specifies the applicability of article 6, part 2. Acts 1974 (65 G.A.) ch. 1250, § 1.201.

537.1203. Jurisidiction – service of process

1. The district court of this state may exercise jurisdiction over any person with respect to any conduct in this state governed by this chapter or with respect to any claim arising from a transaction subject to this chapter. In addition to any other method provided by rule or by statute, and of any separate agreement of obligation signed by the person entitled to the notice.

Acts 1974 (65 G.A.) ch. 1250, § 3.208.

537.3209. Advertising

1. A seller, lessor, or lender shall not advertise, print, display, publish, distribute, utter or broadcast, or cause to be advertised, printed, displayed, published, distributed, uttered or broadcast in any manner, any false, misleading, or deceptive statement or representation with regard to the rates, terms or conditions of credit with respect to a consumer credit transaction.

2. Advertising that complies with the Truth in Lending Act does not violate this section.

3. This section does not apply to the owner or personnel, as such, of any medium in which an advertisement appears or through which it is disseminated.

Acts 1974 (65 G.A.) ch. 1250, § 3.209.

537.6103. Administrator

Except as expressly provided in sections 537.6106 and 537.6108, "administrator" means the attorney general or the attorney general's designee.

Acts 1974 (65 G.A.) ch. 1250, § 6.103.

537.6104. Powers of administrator – reliance on rules – duty to report.

1. The administrator, within the limitations provided by law, may:

a. Receive and act on complaints.

b. Take action designed to obtain voluntary compliance with this chapter.

c. Commence proceedings on the administrator's own initiative.

d. Counsel persons and groups on their rights and duties under this chapter.

e. Establish programs for the education of consumers with respect to credit practices and problems.

f. Make studies appropriate to effectuate the purposes and policies of this chapter and make the results available to the public.

g. Maintain offices within this state.

2. The administrator may enforce the Truth in Lending Act to the fullest extent provided by law.

3. To keep the administrator's rules in harmony with the rules of administrators in other jurisdictions which enact the uniform consumer credit code, the administrator, so far as is consistent with the purposes, policies and provisions of this chapter, shall do both of the following:

a. Before adopting, amending and repealing rules, advise and consult with administrators in other jurisdictions which enact the uniform consumer credit code.

b. In adopting, amending, and repealing rules, take into consideration the rules of administrators in other jurisdictions which enact the uniform consumer credit code.

4. Except for refund of an excess charge, no liability is imposed under this chapter for an act done or omitted in conformity with a rule of the administrator notwithstanding that after the act or omission the rule is amended or repealed or determined by judicial or other authority to be invalid for any reason.

5. The administrator shall report annually on or before January 1 to the general assembly on the operation of the consumer credit protection bureau and the other agencies of this state charged with administering this chapter, on the use of consumer credit in the state, and on the problems of persons of small means obtaining credit from persons regularly engaged in extending sales or loan credit. For the purpose of making the report, the administrator may conduct research and make appropriate studies. The report shall include, for the consumer credit protection bureau and for other state agencies enforcing this chapter, a description of the examination and investigation procedures and policies, a statement of policies followed in deciding whether to investigate or examine the offices of credit suppliers subject to this chapter, a statement of the number and percentages of offices which are periodically investigated or examined, a statement of the types of consumer credit problems of both creditors and consumers which have come to the administrator's attention through the administrator's examinations and investigations and the disposition of them under existing law, and recommendations, if any, for legislation to deal with those problems within the administrator's general jurisdiction, a statement of the extent to which the rules of the administrator pursuant to

this chapter are not in harmony with the rules of administrators in other jurisdictions which enact the uniform consumer credit code and the reasons for the variations, and a general statement of the activities of the administrator's office and of others to promote the purposes of this chapter. The report shall not identify the creditors against whom action is taken.

Acts 1974 (65 G.A.) ch. 1860, § 6.104.

537.6110. Injunctions and other proceedings in equity

The administrator may bring a civil action to restrain a person from violating this chapter and for other appropriate relief, including but not limited to the following:

a. To prevent the use or employment by a person of practices prohibited by this chapter.

b. To reform contracts to conform to this chapter and to rescind contracts into which a creditor has induced a consumer to enter by conduct violating this chapter, even though the consumers are not parties to the action. An action under this section may be joined with an action under the provisions on civil actions by the administrator under section 537.6113.

Acts 1974 (65 G.A.) ch. 1250 § 6.110.

537.6112. Temporary relief

With respect to an action brought to enjoin violations of this chapter under section 537.6110 or unconscionable agreements or fraudulent or unconscionable conduct under section 537.6111, the administrator may apply to the court for appropriate temporary relief against a defendant, pending final determination of the action. The court may grant appropriate temporary relief.

Acts 1974 (65 G.A.) ch. 1250, § 6.112.

537.6113. Civil actions by administrator

1. After demand, the administrator may bring a civil action against a person for all amounts of money, other than penalties, which a consumer or class of consumers has a right to recover explicitly granted by this chapter. The court shall order amounts recovered or recoverable under this subsection to be paid to each consumer or set off against the consumer's obligation. A consumer's action, other than a class action, takes precedence over a prior or subsequent action by the administrator with respect to the claim of that consumer. A consumer's class action takes precedence over a subsequent action by the administrator with respect to claims common to both actions but intervention by the administrator is authorized. An administrator's action on behalf of a class of consumers takes precedence over a consumer's subsequent class action with respect to claims

common to both actions. Whenever an action takes precedence over another action under this subsection, the latter action may be stayed to the extent appropriate while the precedent action is pending and dismissed if the precedent action is dismissed with prejudice or results in a final judgment granting or denying the claim asserted in the precedent action. A defense available to a person in a civil action brought by a consumer is available to the person in a civil action brought under this subsection.

2. The administrator may bring a civil action against a person to recover a civil penalty of no more than five thousand dollars for repeatedly and intentionally violating this chapter. No civil penalty pursuant to this subsection may be imposed for violation of this chapter occurring more than two years before the action is brought or for making unconscionable agreements or engaging in a course of fraudulent or unconscionable conduct.

3. The administrator may bring a civil action against a person for failure to file notification in accordance with the provisions on notification in section 537.6202, or to pay fees in accordance with the provisions on fees in section 537.6203, to recover the fees the defendant has failed to pay plus interest at the rate of seven percent per annum and the administrator's reasonable costs in bringing the action, and a civil penalty in an amount determined by the court not exceeding the greater of three times the amount of fees the person has failed to pay or one thousand dollars.

Acts 1974 (65 G.A.) ch. 1250, § 6.113.

(2)

No. 90-583

In The

Supreme Court of the United States

October Term, 1990

BAXTER CHRYSLER PLYMOUTH, INC.,

and

JOHN MARKEL, INC., d/b/a
MARKEL FORD, et al.

and

JOHN KRAFT CHEVROLET, INC.,
d/b/a JOHN KRAFT CHEVROLET-ISUZU, INC.

and

STAN OLSEN PONTIAC, INC., d/b/a OLSEN AUTO WORLD AND OLSEN FAMILY DISCOUNT CENTER,

Petitioners,

vs.

THE STATE OF IOWA, ex rel.
THOMAS J. MILLER, Attorney General of Iowa,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE IOWA SUPREME COURT

THOMAS J. MILLER
Attorney General of Iowa

GORDON E. ALLEN
Deputy Attorney General
Counsel of Record

RICHARD L. CLELAND
Special Assistant Attorney General

WILLIAM L. BRAUCH
Assistant Attorney General
Consumer Protection Division
1300 E. Walnut
Hoover State Office Building
Des Moines, IA 50319
(515) 281-5926

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. WHETHER OMAHA, NEBRASKA MOTOR VEHICLE DEALERS ARE SUBJECT TO THE PERSONAL JURISDICTION OF IOWA COURTS BASED ON THEIR ADVERTISEMENTS IN A NEWSPAPER WITH SUBSTANTIAL IOWA CIRCULATION, ON A TELEVISION STATION BROADCAST INTO IOWA, AND IN THE COUNCIL BLUFFS, IOWA TELEPHONE BOOK.

II. WHETHER IOWA STATE COURTS HAVE SUBJECT MATTER JURISDICTION OVER CLAIMS BROUGHT PURSUANT TO THE CREDIT ADVERTISING PROVISIONS OF THE IOWA CONSUMER CREDIT CODE AND THE IOWA CONSUMER FRAUD ACT.

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No. 90-583

In The

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Petitioners,

vs.

THE STATE OF IOWA, ex rel.
THOMAS J. MILLER, Attorney General of Iowa,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE IOWA SUPREME COURT

The Respondent, State of Iowa, respectfully suggests that the petition for certiorari be denied.

OPINION BELOW

The Iowa Supreme Court decision was filed May 23, 1990, and is reprinted in "Appendix A" to the petition. It is reported as *State v. Baxter Chrysler-Plymouth, Inc., et al.*, 456 N.W.2d 371 (Iowa 1990). That court, sitting en banc, denied Baxter Chrysler-Plymouth's petition for rehearing on June 20, 1990. That Order is reprinted in "Appendix B" to the petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the following provisions of federal law which were not included in the Petition.

15 U.S.C. § 1610(a)(1). Effect on other laws. Inconsistent provisions; procedures applicable for determination.

(a)(1) This part and parts B and C of this subchapter do not annul, alter, or affect the laws of any State relating to the disclosure of information in connection with credit transactions, except to the extent that those laws are inconsistent with the provisions of this subchapter and then only to the extent of the inconsistency. Upon its own motion or upon the request of any creditor, State or other interested party which is submitted in accordance with procedures prescribed in regulations of the Board, the Board shall determine whether any such inconsistency exists. If the Board determines that a State-required disclosure is inconsistent, creditors located in that State may not make disclosures using the inconsistent term or form, and shall incur no liability under the law of that State for failure to use such term or form, notwithstanding that

such determination is subsequently amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

(March 31, 1980, 94 Stat. 173.)

15 U.S.C. § 1667c. Consumer lease advertising; liability of advertisers.

(a) No advertisement to aid, promote, or assist directly or indirectly any consumer lease shall state the amount of any payment, the number of required payments, or that any or no downpayment or other payment is required at inception of the lease unless the advertisement also states clearly and conspicuously and in accordance with regulations issued by the Board each of the following items of information which is applicable:

(1) That the transaction advertised is a lease.

(2) The amount of any payment required at the inception of the lease or that no such payment is required if that is the case.

(3) The number, amounts, due dates or periods of scheduled payments, and the total of payments under the lease.

(4) That the lessee shall be liable for the differential, if any, between the anticipated fair market value of the leased property and its appraised actual value at the termination of the lease, if the lessee has such liability.

(5) A statement of the amount or method of determining the amount of any liabilities the lease imposes upon the lessee at the end of the term and whether or not the lessee has the option to purchase the leased property and at what price and time.

(b) There is no liability under this section on the part of any owner or personnel, as such, of any medium, in which an advertisement appears or through which it is disseminated.

(Pub.L. 90-321. Title I, § 184, as added Pub.L. 94-240, § 3, Mar. 23, 1976, 90 Stat. 259.)

STATEMENT OF THE CASE

This case originated as five separate civil actions filed by the respondent, the State of Iowa, by Attorney General Thomas J. Miller, against various Omaha, Nebraska motor vehicle dealerships and their corporate presidents. The State alleged that the dealers' advertisements in the *Omaha World Herald* newspaper were deceptive and misleading and, therefore, violated the Iowa Consumer Fraud Act, Iowa Code § 714.16. The State also alleged that several of the same advertisements violated the credit advertising provisions of the Iowa Consumer Credit Code, Iowa Code Chapter 537. The advertisements were contained in the "Iowa Edition" of the *Omaha World Herald*, a newspaper sold, distributed, and delivered to Iowans in Iowa.

The actions were originally filed in the Iowa District Court in Council Bluffs, across the Missouri River from Omaha. Thereafter, the dealers filed removal petitions to the federal court in Iowa. The State responded with motions to remand, arguing lack of federal diversity and subject matter jurisdiction. The dealers resisted the State's motions to remand and filed motions to dismiss

for lack of personal jurisdiction. The cases were then consolidated.

In an order dated July 12, 1988, the Honorable Donald E. O'Brien, United States District Court Judge, granted the State's motions to remand, finding a lack of federal diversity and federal subject matter jurisdiction. The federal court did not issue a ruling on the dealers' motions to dismiss for lack of personal jurisdiction. The July 12, 1988 order is reprinted in "Appendix C" to the petition. On December 23, 1988, the federal court denied the dealers' motion to reconsider the July 12, 1988 ruling. The December 23, 1988 order is reprinted in "Appendix M" to this brief.

Upon remand to the Iowa district court, the dealers filed separate motions to dismiss for lack of personal and subject matter jurisdiction and for failure to state a claim upon which relief could be granted. The cases were consolidated. In an order of April 6, 1989, the Iowa district court granted the dealers' motions to dismiss for lack of personal jurisdiction. Contrary to the dealers' assertion in the petition, however, the Iowa district court made no ruling regarding the dealers' motions to dismiss for lack of subject matter jurisdiction or for failure to state a claim upon which relief can be granted. The Iowa district court's order of April 6, 1989 is reprinted in "Appendix D" to the petition.

The State appealed the dismissal of the actions to the Iowa Supreme Court. The Supreme Court reversed the district court, holding that the dealers' advertisements in the *Omaha World Herald*, a newspaper delivered to the homes of Iowa residents and sold at retail locations in

Iowa, and the dealers' advertisements in the U.S. West Yellow Pages telephone book directory for Council Bluffs, Iowa constituted sufficient minimum contacts with the State of Iowa to support the exercise of personal jurisdiction over the corporate defendants. The Court further held that the finding of sufficient minimum contacts was particularly appropriate in these cases in that the State's causes of action were based solely on the dealers' contacts with Iowa, their advertisements. However, the Supreme Court affirmed the dismissals as to the corporate president defendants. The dealers' motion for a rehearing was denied by the Iowa Supreme Court on June 20, 1990. Thereafter, one of the five defendants, Dean Rawson Nissan, Inc., withdrew from the lawsuit and entered into a consent judgment with the State.

SUMMARY OF ARGUMENT

The decision of the Iowa Supreme Court is consistent with the decisions or this Court, federal appellate and district courts, and state appellate courts. The Iowa contacts of these motor vehicle dealerships are sufficient to subject them to the personal jurisdiction of Iowa courts. The causes of action alleged by the State are based solely on the dealers' advertisements in the *Omaha World Herald* newspaper and on a television station broadcast into Iowa. The dealers' advertisements appear on almost a daily basis in editions of the newspaper which are delivered to the homes of Iowa residents in the Omaha-Council Bluffs metropolitan area and in other parts of Iowa via home deliveries of the "Iowa Edition" of the newspaper. More than eleven per cent of the total circulation of the

newspaper is to Iowa residents. Considering only the Sunday circulation of the *Omaha World Herald* into Iowa, each of the dealerships has in excess of 1.7 million separate contacts per year with Iowa residents. The dealers also each advertise in the Council Bluffs, Iowa Yellow Pages telephone directory.

The dealers' efforts to serve the Iowa market through their advertisements in Iowa, and their location in a metropolitan area that is comprised, in part, of Iowa residents, are such that the dealers can reasonably anticipate being haled into court in Iowa, *particularly* for actions concerning those very advertisements. The writ should be denied under Supreme Court Rule 10 since the Iowa Supreme Court's decision is consistent with the holdings of this Court and because there are no special or important reasons for the exercise of judicial discretion in granting the writ.

ARGUMENT

REASONS FOR DENYING THE WRIT

I. THE IOWA CONTACTS OF THESE MOTOR VEHICLE DEALERSHIPS ARE SUFFICIENT TO SUBJECT THEM TO THE PERSONAL JURISDICTION OF IOWA COURTS; THE DECISION OF THE IOWA SUPREME COURT IS CONSISTENT WITH THE DECISIONS OF THIS COURT, FEDERAL APPELLATE AND DISTRICT COURTS, AND STATE APPELLATE COURTS.

The Iowa Supreme Court recognized that a state may only exercise jurisdiction over a nonresident defendant consistently with the due process clause of the fourteenth

amendment if that defendant has certain "minimum contacts" with the forum state. *State v. Baxter Chrysler-Plymouth, Inc., et al.*, 456 N.W.2d 371, 375 (Iowa 1990). The State need only allege a prima facie case for jurisdiction. *Institutional Food and Marketing Associates, Ltd. v. Golden State Strawberries, Inc.*, 747 F.2d 448, 453 (8th Cir. 1984).[1] The State has alleged facts in each petition sufficient to constitute a prima facie finding of jurisdiction over these dealers.

A. THESE DEALERS SEEK TO SERVE THE IOWA MARKET DIRECTLY.

The Iowa Supreme Court relied on this Court's holding in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295-299 (1980), that sufficient minimum contacts over a foreign defendant can be established based on efforts by the foreign defendant to directly or indirectly seek to serve a market in the forum state.[2] 456 N.W.2d at 375.

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[1] The dealers have misstated the court's holding in *Golden State Strawberries*. The State is not required to "plead and prove" jurisdiction.

[2] This Court has consistently applied this analysis in cases subsequent to *World-Wide Volkswagen*, most recently in *Asahi Metal Industry Co. v. Superior Court of California, Solano County*, 480 U.S. 102 (1987). In *Asahi*, a majority of the Court held that it would offend "traditional notions of fair play and substantial justice" to subject a Japanese company to the personal jurisdiction of California courts in that no California parties remained in the action. *Id.* at 113-116. However, the Court, via separate plurality opinions, held that states have personal jurisdiction of non-resident defendants who directly or indirectly seek to serve a market in the forum state.

(Continued on following page)

In *World-Wide Volkswagen*, a New York resident who purchased a car from a New York auto dealer had an accident with the car in Oklahoma and sued the dealer, manufacturer, and others for an allegedly defective design and placement of the car's fuel system. In holding that the defendant manufacturers did not have sufficient minimum contacts and could not reasonably anticipate being haled into Oklahoma state court, the Court relied on the fact that the manufacturers and their dealer-retailers did not directly or indirectly seek to serve the Oklahoma market. Their only contacts were through the unfortunate circumstance of a car the dealer sold being involved in an accident while passing through Oklahoma. 444 U.S. at 295-299.[3]

In *World-Wide Volkswagen*, the Court found that Oklahoma was not part of the defendant's market area. 444 U.S. at 298. Here, the dealers are separated by only a few hundred yards of water from the forum state, unlike the hundreds of miles that separated the defendant from Oklahoma in *World-Wide Volkswagen*. The dealers chose to

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Id. at 112, 121. The Justices joining in Justice O'Connor's plurality opinion held that advertising in the forum is sufficient. *Id.* at 112. The Justices joining in Justice Brennan's plurality opinion held that the defendant's knowledge that its product was part of another product being marketed in the forum state constituted sufficient minimum contacts. *Id.* at 121.

[3] Contrary to the dealers' assertion in their petition, the Court in *World-Wide Volkswagen* did not draw a distinction between manufacturer contacts and retailer contacts for the purposes of this analysis. The Iowa Supreme Court drew no such distinction in its opinion.

place advertisements in the metropolitan and "Iowa" editions of the Omaha newspaper and large block advertisements and listings in the Council Bluffs, Iowa, telephone directory in their self-directed efforts to reach and serve the Iowa market.

In a case nearly identical to the cases before this Court, the Supreme Court of Alabama held that a Stone Mountain, Georgia motor vehicle dealer had sufficient minimum contacts with the State of Alabama based upon the dealer's advertisements in Atlanta, Georgia and Gwinnet County, Georgia newspapers and on Atlanta television stations. *Ex parte Pope Chevrolet, Inc. (Re Emmie Wallace v. Pope Chevrolet, Inc., et al.)*, 555 So.2d 109, 113-114 (Ala. 1989).[4] The court held that the dealer's advertisements in Georgia media constituted sufficient minimum contacts with the state of Alabama even though the dealer did not aim its advertising at Alabama residents. 555 So.2d at 113-114. Just as the Iowa Supreme Court did in *Baxter*, the Alabama court correctly reasoned that the dealer's advertisements in out-of-state media which also served the forum state showed that the dealer was soliciting sales in the forum.[5] 555 So.2d at 114.

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[4] *Ex parte Pope Chevrolet, Inc.*, involved an action in an Alabama state court by an Alabama resident against the Georgia dealer alleging fraud and breach of contract in her purchase of a pick-up truck from the Georgia dealer. 555 So.2d at 109-110.

[5] On page 11 of the dealers' petition they state that the Respondent is relying, in part, on *Gunner v. Elmwood Dodge, Inc.*, 506 N.E.2d 175 (Mass. 1987). The State did not cite this case to the Iowa Supreme Court, nor is it relying on this case now.

B. THE CAUSES OF ACTION ALLEGED ARE DIRECTLY RELATED TO THE DEALERS' CONTACTS.

The State alleged that the dealers' regular advertisements and solicitations in a newspaper sold, distributed, and delivered to Iowans in Iowa, violated Iowa laws regarding credit term advertising and deceptive advertising. These same advertisements are the bases for finding jurisdiction over the dealers in Iowa.

In *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414, nn. 8, 9 (1984), this Court drew a distinction between "general" and "specific" contacts with the forum state.[6] In *Helicopteros*, the Court stated that in "specific jurisdiction" cases the plaintiff need only allege a "relationship among the defendant, the forum, and the litigation," for the forum state to exercise personal jurisdiction over a foreign defendant. 466 U.S. at 414. However, in cases involving "general jurisdiction," the plaintiff must make a showing that the defendant had continuous and systematic contacts with the forum state. 466 U.S. at 415-416. More contact is required with the forum state in "general jurisdiction" cases because the state has no

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[6] When a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising "specific jurisdiction" over the defendant. 466 U.S. at 414, n. 8. When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State is exercising "general jurisdiction" over the defendant. *Id.*, n. 9.

direct interest in the cause of action. *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 374 (5th Cir. 1987).

The claims asserted against these dealers arise solely out of, or relate to, the dealers' contacts with the forum. The State is only required to allege that the dealers purposefully directed their advertisements to Iowans and that these advertisements caused harm in Iowa. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-476 (1985).

"Specific jurisdiction" may be found to exist where the defendant has only one contact with the forum state if the cause of action is directly related to that contact. *Burger King*, 471 U.S. at 475, n. 18. The State has alleged facts sufficient for Iowa courts to possess "specific jurisdiction" over the dealers. The State has alleged that the advertisements harmed Iowans because they were deceptive and misleading in violation of the Iowa Consumer Fraud Act and the Iowa Consumer Credit Code.

C. THE OMAHA DEALERS' CONTACTS WITH IOWANS ARE PERSISTENT AND NUMEROUS.

The dealers' advertisements were regularly disseminated to Iowans. The dealers advertised on an almost daily basis in the metropolitan edition and in the "Iowa Edition" of the *Omaha World Herald*, a large metropolitan newspaper which is delivered to the homes of, and read by, substantial numbers of Iowans.[7]

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[7] Sales of the Sunday *Omaha World Herald* in Iowa represent 11.5% of all sales of that edition of the newspaper.

(Continued on following page)

The metropolitan edition of the newspaper is received by residents in the Omaha-Council Bluffs metropolitan area, including residents of Pottawattamie County, Iowa. Omaha, Nebraska and Council Bluffs, Iowa are separated only by the Missouri River. Together they constitute one metropolitan area.[8] The "Iowa Edition" of the *Omaha World Herald* is delivered and sold to Iowans living in Iowa, outside of the Omaha-Council Bluffs metropolitan area. The "Iowa Edition" is geared towards Iowans in that it contains many Iowa news stories.

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(Appendix N to this brief, pages 6a-7a.) Approximately 28% of all Council Bluffs, Iowa households received home delivered subscriptions of the Sunday *Omaha World Herald* during 1987. In December, 1987, there were 5,700 home delivered subscriptions of the Sunday *Omaha World Herald* in the city of Council Bluffs which has, according to the Council Bluffs Chamber of Commerce figures, 21,060 households. (Appendix K to the petition, pages 121a and 122a.) Contrary to the dealers' assertion in their petition, the Iowa district court did not find that circulation of the *Omaha World Herald* into Iowa constituted less than 2% of the total circulation of the newspaper. A review of the district court's opinion reveals that the Court merely stated that this was the percentage of the circulation of the newspaper into Council Bluffs, Iowa, not into the entire State of Iowa. (Appendix D to the petition, page 35a.)

[8] Council Bluffs, Iowa, and Omaha, Nebraska compose a Standard Metropolitan Statistical Area, a U.S. Census Bureau term, which is defined as "a large population nucleus and nearby communities which have a high degree of economic and social integration with that nucleus." (See: U.S. Department of Commerce, Bureau of the Census, *1980 Census of Population and Housing, Users' Guide*, Part B. Glossary (November, 1982)).

Every time a copy of the *Omaha World Herald* containing a disputed advertisement is sold in Iowa, that sale is a separate contact by the advertising dealer with the State of Iowa.[9] Considering only their advertisements in the Omaha World Herald, the dealers' contacts with Iowa are numerous.

In addition, residents of Pottawattamie County, Iowa, watch Omaha television stations which report the news of the two-state metropolitan area. The only television stations which serve the Omaha-Council Bluffs metropolitan area are Nebraska stations. The State alleged that the advertisements of Baxter Chrysler-Plymouth, Inc. on an Omaha television station violated Iowa law. Each time a person in Iowa views a television advertisement by one of these dealers, the viewing constitutes a separate Iowa contact by that dealer.

Each of the dealerships chose to advertise in the U.S. West Direct Yellow Pages Directory for Council Bluffs, Iowa. Two of the dealerships, Baxter Chrysler-Plymouth, Inc. and Olsen's Auto World, have large block advertisements in the Directory. Advertisements placed by foreign defendants in Yellow Page Directories within the forum

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[9] Assuming that each defendant advertised in the *Omaha World Herald* newspaper each Sunday, each defendant would have fifty-two yearly contacts with every Iowa resident that subscribed to the Sunday edition of the newspaper. The total circulation in Iowa of the Sunday edition of the Iowa and metropolitan editions of the *Omaha World Herald*, as of March, 1989, was 33,124. (Appendix N to this brief, page 6a.) Therefore, each defendant has 1,722,448 contacts with Iowa residents every year, considering only the defendants' advertisements in the Sunday edition of the Omaha newspaper.

state have been held by a federal district court to constitute "contacts" with the forum state. *Hayworth v. Beech Aircraft Corp.*, 690 F. Supp. 962, 965 (D. Wyo. 1988). Each copy of the Yellow Pages Directory that is provided to an Iowan, and containing a listing for one of these dealers, constitutes a separate contact by that dealer with the State of Iowa.

The dealers did not, nor can they deny that their newspaper, television, and Yellow Pages advertisements reached the Iowa market and were read or viewed by Iowans. The dealers' contacts with Iowa are sufficiently persistent and numerous to subject them to the personal jurisdiction of Iowa courts.

D. THE CIRCULATION OF THE DEALERS' MISLEADING ADVERTISEMENTS IN IOWA SUBJECTS THEM TO IOWA JURISDICTION.

This Court has found sufficient minimum contacts with the forum state where the advertising of a foreign defendant was circulated in the forum state. In *Calder v. Jones*, 465 U.S. 783 (1984), the defendants were Florida residents who wrote an allegedly libelous article about the California plaintiff in a publication with a national circulation. While the defendants had few contacts with California, the Court found that California had personal jurisdiction of the defendants because their intentional conduct in writing the article was calculated to have effect in California. *Id.* at 789-790. The Court held that, although the defendants in *Calder* did not control the circulation of the magazine, they could reasonably anticipate being haled into California courts. *Id.*

The determination of whether a defendant has engaged in "wrongdoing intentionally directed at" a resident of the forum state, as found in *Calder, Id.* at 790, is not to be narrowly construed. In *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), this Court held that New Hampshire courts possessed personal jurisdiction over an Ohio corporation with its principal place of business in California in a libel action filed by a New York resident against the defendant based upon the contents of the magazine published by the defendant. The Court reasoned that, although the defendant's only contact with New Hampshire was to sell 14,000 copies of its magazine in New Hampshire, "regular monthly sales of thousands of magazines [in the forum state] cannot by any stretch of the imagination be characterized as random, isolated, or fortuitous," and New Hampshire jurisdiction based upon those contacts satisfied the requirements of the due process clause. 465 U.S. at 774-775.

The Court further reasoned that states have an interest in redressing injuries which occur within their borders, and because false statements of fact in a publication harm the readers of those statements, states may employ their libel laws to discourage deception of their citizens, regardless of the residence of the defendant. *Id.* at 776-778.

Under *Calder* and *Keeton*, a nonresident defendant who distributes libelous publications in a forum state is subject to personal jurisdiction in the forum state so long as the distribution of those publications in the forum is not a "random, fortuitous, or isolated" event. Although *Calder* and *Keeton* involved libel actions, the analysis applied by the Court in those cases is, at a minimum,

applicable to actions based upon fraud. Both involve false statements and both are, for some purposes, considered to be torts. *Beeck v. Kapalis*, 302 N.W.2d 90, 94 (Iowa 1981); W. Prosser and W. Keeton, *Handbook of the Law of Torts*, § 105 (5th Ed. 1984); Restatement (Second) of Torts § 525 (1977).

The dealers intend that their advertisements be read and viewed by Iowans. The dealers presumably are also aware that false statements made in their advertisements will harm Iowans. The State has alleged that these advertisements contained unlawful and misleading statements and that such statements have harmed Iowa residents. The dealers' advertisements were not random, fortuitous, or isolated. *Calder* and *Keeton* confirm that these dealers have sufficient minimum contacts with the State of Iowa.

E. BECAUSE THE IOWA SUPREME COURT'S HOLDING IS CONSISTENT WITH FEDERAL AND STATE APPELLATE DECISIONS, SUPREME COURT RULE 10 SUGGESTS DENIAL OF THIS PETITION.

As demonstrated above, the decisions of this Court and of state and federal appellate courts are consistent with the Iowa Supreme Court's holding. No appellate court addressing a set of facts similar to those present in these actions has found a lack of sufficient minimum contacts. Therefore, no special and important reasons exist for the exercise of judicial discretion in granting the writ and, pursuant to Supreme Court Rule 10, the petition should be denied.

II. THE CASES CITED IN THE PETITION ARE FACTUALLY DISSIMILAR FROM THESE ACTIONS AND FAIL TO SHOW ANY PURPORTED CONFLICT WITH THE DECISIONS OF THIS COURT OR CONFLICTS IN THE CIRCUITS.

In their petition, the dealers wrongfully rely on *Herman Miller v. MR.Rents, Inc.*, 545 F.Supp. 1241 (W.D. Mich. 1982), a trademark infringement and false advertising case wherein advertisements by the Illinois defendant in Chicago newspapers were held not to provide a sufficient basis for jurisdiction in a Michigan court. The court, in *Herman Miller,* reasoned that Michigan was not part of the defendant's intended market area, the "Chicagoland audience." *Id.* at 1245. Sales of the Chicago publications in Michigan constituted only 1.36% or less of the daily and Sunday circulations of those publications. 545 F.Supp. at 1243-1245. Even assuming that court's decision was correct, which may be questionable, here, sales of the Sunday *Omaha World Herald* in Iowa represent 11.5% of all sales of that newspaper. This is 8.5 times the percentage of the circulation of the Chicago newspapers into Michigan in *Herman Miller.* In addition, sales of the *Omaha World Herald* are received via subscription alone in nearly 30% of all Council Bluffs, Iowa households. The Council Bluffs-Omaha market is intentionally saturated with the dealers' advertising.

The dealers also wrongfully rely on *Mountainaire Feeds, Inc. v. Agro Impex S.A.*, 677 F.2d 651 (8th Cir. 1982). *Mountainaire Feeds* did not involve a defendant located on the border of the forum state soliciting sales in the forum. In addition, in *Mountainaire Feeds,* the plaintiff

relied greatly on facts which related to the plaintiff's unilateral performance of its contract with the defendant in the forum state. *Id.* at 655. In direct contrast, here, the State is not relying on any actions by the State or by Iowa residents. It is the dealers' own persistent advertising in Iowa which subjects them to Iowa jurisdiction.

Other cases relied on in the petition are also factually dissimilar. In *Wines v. Lake Havasu Boat Manufacturing, Inc.*, 846 F.2d 40 (8th Cir. 1988), and *Institutional Food and Marketing Associates, Ltd. v. Golden State Strawberries, Inc.*, 747 F.2d 448 (8th Cir. 1984), although sufficient minimum contacts were not found, both cases involved defendants located in excess of one thousand miles from the forum state and each defendant had only a few tenuous contacts with the forum.

The dealers' reliance on *Berks v. Red Mountain Ski Corporation*, 571 F.Supp. 500 (N.D. Ill. 1983), is also misguided. In *Berks*, the Illinois plaintiff was required to meet the requirements of the Illinois long-arm statute by showing that the nonresident Wisconsin defendant's advertising in Illinois constituted "doing business" in Illinois. 571 F.Supp. at 501. No such showing is required of the State in these actions. The court, in *Berks*, specifically stated that it was *not* examining the defendant's contacts with the forum state "to the full extent the due process clause would allow." *Id.* Since the defendant's advertising was not sufficiently persistent, was the defendant's only Illinois contact, and had nothing to do with the plaintiff's claim, the court found that it lacked personal jurisdiction. *Id.* at 501-502. In addition, the business location of the defendant was more than 100 miles north

of the Illinois border. Therefore, *Berks* is nothing like the cases before this Court.

The dealers also mistakenly rely on *Cox Enterprises, Inc. v. Holt*, 678 F.2d 936 (11th Cir. 1982), wherein the court found that there was no evidence that the defendant newspaper had tried to develop a market in the forum state "beyond making the paper available to a few readers in the state . . . " 678 F.2d at 939. *Cox* was a libel suit filed in Alabama against an Atlanta, Georgia newspaper, and the court especially noted,

> "[f]irst amendment considerations surrounding the law of libel require a greater showing of contact to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity . . . an expansion of jurisdiction to the limits permitted by due process in other types of cases would tend to have a 'chilling' effect on the press because publishers would hesitate to distribute their newspapers in any areas other than those of their major circulation."

678 F.2d at 937-938.

This "greater showing" is not required in these cases since these are not libel actions and the defendants are retailers rather than publishers of newspapers.[10] Nothing in the petition to this Court suggests that the Iowa Supreme Court misapplied the decisions of this Court. The petition should be denied.

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[10] The various media in which the dealers' advertisements appeared are not parties to these actions. In addition, subsequent to *Cox*, this Court held that First Amendment concerns should not enter into the jurisdictional analysis. *Calder v. Jones*, 465 U.S. at 790.

III. THE IOWA SUPREME COURT CORRECTLY HELD THAT IOWA COURTS HAVE SUBJECT MATTER JURISDICTION OVER THESE CLAIMS.

In their petition, the dealers argue that Iowa courts lack subject matter jurisdiction of these actions. The Iowa Supreme Court rejected this argument, holding that Iowa courts clearly have subject matter jurisdiction of these claims in that they are based solely on Iowa law. *State v. Baxter,* 456 N.W.2d at 378.

A. IOWA COURTS HAVE SUBJECT MATTER JURISDICTION OF THESE ACTIONS UNDER THE IOWA CONSUMER CREDIT CODE.

In each action the State alleged that the advertisement in question violated the Iowa Consumer Fraud Act, Iowa Code § 714.16. For several of the advertisements addressed in each action, the State alleged that those advertisements also violated the credit advertising provisions of the Iowa Consumer Credit Code, Iowa Code Chapter 537 (hereafter "ICCC").[11]

In enacting the ICCC, the Iowa legislature was implementing the Uniform Consumer Credit Code (hereafter "UCCC"). A provision within the UCCC allows for the incorporation of the federal Truth in Lending Act, 15

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[11] On page 24 of their petition to this Court, the dealers falsely stated that "the entire complaint is based solely upon the Federal Truth in Lending Act ('TILA') and upon the purported allowance of Iowa's enforcement of the TILA." As stated above, each of the State's petitions includes allegations that certain advertisements violated the Iowa Consumer Fraud Act for which no allegations are made of TILA violations.

U.S.C. § 1601 et seq. (1987) (hereafter, "TILA"), into the UCCC, as part of state law. UCCC § 6.104(2), 1 Consumer Credit Guide (CCH) ¶ 6294 (1976). In the official comments concerning the UCCC's incorporation of the TILA, it was stated that the purpose of this incorporation was to conform state regulation of consumer credit transactions to the policies of the federal TILA. In order to gain an exemption under Section 123 of the TILA, state regulation substantially similar to that in the TILA must be enacted. Therefore, in order to allow for states to obtain exemptions from federal preemption under the TILA, the UCCC provided for incorporation of the entire Act. UCCC, 1 Consumer Credit Guide (CCH) ¶ 4775 (1976).

It is clear that the Iowa legislature adopted the UCCC position regarding incorporation of the TILA. Iowa Code § 537.6104 is nearly identical to Section 6.104 of the UCCC. In these cases, Iowa is enforcing its state consumer credit laws which incorporate provisions of the federal TILA into state law as part of the ICCC.

The federal TILA, 15 U.S.C. § 1610(a)(1)iii (1987), only preempts those state laws which are inconsistent with the federal Act, and only to the extent of the inconsistency. Only seven states have been ruled by the Federal Reserve Board to be preempted under the TILA; Iowa is not one of those states. FRB Official Staff Commentary § 226.28(a)-8 through -14.

In section 1610(a)(1) of the TILA, Congress specifically acknowledges the possibility of liability for violations of state truth-in-lending laws which are consistent with the federal Act. Here, the ICCC is completely consistent with the federal Act. Iowa Code § 537.1302 defines

the truth-in-lending provisions of the ICCC as being the federal Truth in Lending Act and its implementing regulations. Therefore, because a violation of the federal Truth in Lending Act is, by definition, a violation of the Iowa Consumer Credit Code, Iowa law is completely consistent with federal law and is not preempted.

In addition, caselaw authority interpreting section 1610(a)(1) makes it clear that Congress did not intend the federal remedy to be the exclusive remedy for violations of truth-in-lending laws. *Commercial Lawyers Conference v. Grant*, 65 Misc.2d 897, 318 N.Y.S.2d 966, 970 (N.Y. 1971); *Aldens, Inc. v. Ryan*, 454 F.Supp. 465, 474 (D.C. Okl. 1976), *aff'd* 571 F.2d 1159 (10th Cir. 1978); and, *Commonwealth ex rel. Zimmerman v. Nickel*, 26 Pa.D.&C.3d 115, 128-131 (C.P. Mercer Cty. 1983) (failure to provide truth-in-lending rescission notice was a violation of state unfair deceptive acts and practices statute in action brought by state attorney general.)

B. THESE ACTIONS DO NOT UNCONSTITUTIONALLY INTERFERE WITH INTERSTATE COMMERCE.

In attacking the jurisdiction of this Court, the dealers have wrongfully argued that the State's actions are unconstitutional in that they unreasonably interfere with interstate commerce. In *Aldens, Inc. v. Thomas J. Miller*, 466 F.Supp. 379 (S.D. Iowa 1979), *aff'd* 610 F.2d 538 (8th Cir. 1979), *cert. denied*, 446 U.S. 919 (1980), the Eighth Circuit held that when the Iowa Attorney General enforced the ICCC against an out-of-state mail order firm, there was no undue burden imposed on interstate commerce and no

violation of due process. "A state may regulate intrastate activities occurring in connection with interstate commerce and such legislation will not be subject to invalidation merely because of its incidental effect or indirect burden on interstate commerce." 610 F.2d at 539.

The dealers have attempted to distinguish *Aldens* by pointing out that *Aldens* involved state regulation of usurious interest rates, while these cases involve deceptive advertising. The dealers argue that the federal TILA requires uniformity with the federal Act in state regulation of advertising, where such uniformity was not required in the area of interest rates. The dealers are correct. However, as noted above, the Iowa Consumer Credit Code, by definition, is completely consistent with the federal TILA.[12] Under section 1610(a)(1)of the TILA, only those state regulations which are inconsistent with the federal Act are preempted by federal law. Iowa has honored the federal requirement of uniformity. Thus, there can be no finding of unconstitutional interference with interstate commerce under the *Aldens* analysis.

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[12] Under Iowa Code § 537.1302, "Truth in Lending Act," as referred to in the ICCC is defined as "title 1 of chapter 41 of title 15 of the United States Code, as amended to and including July 1, 1982, and includes regulations issued pursuant to that Act, prior to July 1, 1982. Iowa Code § 537.3201 states, in part, "A person upon whom the Truth in Lending Act imposes duties or obligations shall make or give to the consumer the disclosures, information and notices required of the person by that Act, and in all respects shall comply with that Act."

C. THE FEDERAL DISTRICT COURT HELD THAT THESE ACTIONS ARE NOT PREEMPTED UNDER THE FEDERAL TRUTH IN LENDING ACT; THE DEALERS MAY NOT INDIRECTLY APPEAL THAT DECISION TO THIS COURT.

In the federal court's Order denying the dealers' motions to reconsider the court's earlier Order of remand, the court held that the provisions of the federal TILA do not preempt state actions for violations of state truth-in-lending laws.[13] An order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise, except civil rights actions brought pursuant to 28 U.S.C. § 1443. 28 U.S.C. § 1447(d). This Court should not allow the dealers to indirectly appeal the federal court's order of remand by arguing to this Court that the federal court should have found preemption.

IV. THE DEALERS' CONFLICT OF LAWS ARGUMENT IS NOT PROPERLY BEFORE THIS COURT.

The dealers incorrectly argue in their petition that a conflict exists between Nebraska and Iowa law and that the cases should be dismissed because Nebraska law applies. However, the Iowa Supreme Court correctly held that this is a conflicts of law question for the trial court to decide and does not go to the question of subject matter

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[13] Appendix M to this brief, page 4a.

jurisdiction. 456 N.W.2d at 378.[14] Therefore, whether Iowa courts must give "full faith and credit" to Nebraska law in the context of these cases is a question for the state district court to address in the first instance and is not an issue before this Court.[15]

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[14] It should be noted that no actual conflict exists between the Iowa Attorney General's Motor Vehicle Advertising Guidelines and Nebraska's law regarding motor vehicle advertising. An advertiser can easily comply with both Nebraska law and the Iowa advertising guidelines by drafting their advertisements so as to comply with the stricter law or guideline. The Iowa guidelines represent the enforcement position of the Iowa Attorney General and were provided to Iowa and Nebraska car dealerships prior to the circulation of the advertisements in question in these actions. The guidelines are attached to this brief as "Appendix O." Nebraska's motor vehicle advertising law is found in "Appendix F" to the petition.

[15] The dealers alleged in their Statement of the Case in their petition to this Court that they received the approval of the Nebraska Attorney General regarding the legality of the advertisements in question. Whether the Nebraska Attorney General approved the advertisements is a question of fact. Nothing in the facts alleged in the affidavits submitted by the dealers to the trial court refers to approval of advertisements by the Nebraska Attorney General. Therefore, it is improper for the dealers to raise this factual allegation for the first time to this Court. In addition, it is highly unlikely that the Nebraska Attorney General has the practice of approving the advertisements of any business, much less advertisements which violate the federal Truth in Lending Act.

CONCLUSION

For all the foregoing reasons, the petition in certiorari should be denied.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

GORDON E. ALLEN
Deputy Attorney General
Counsel of Record

RICHARD L. CLELAND
Special Assistant
Attorney General

WILLIAM L. BRAUCH
Assistant Attorney General
Consumer Protection Division
1300 E. Walnut
Hoover State Office Building
Des Moines, IA 50319
(515) 281-5926

Attorneys for Respondent

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
WESTERN DIVISION

STATE OF IOWA ex rel. THOMAS J. MILLER, Attorney General of Iowa, Plaintiff, vs. STAN OLSEN PONTIAC, INC., et al. Defendants.	)	CIVIL NO. 87-93-W Filed Dec. 27, 1988
and BAXTER CHRYSLER PLYMOUTH, INC., et al., Defendants.	)	CIVIL NO. 87-94-W
and JOHN MARKEL, INC., d/b/a Markel Ford, et al., Defendants.	)	CIVIL NO. 87-95-W
and JOHN KRAFT CHEVROLET, INC., d/b/a John Kraft Chevrolet-Isuzu, Inc., et al., Defendants.	)	CIVIL NO. 87-96-W

and	)	
	)	CIVIL
DEAN RAWSON NISSAN, INC., et al.,	)	NO. 87-102-W
	)	
Defendants.	)	

ORDER

This matter is before the court on defendants' motion to reconsider the court's order of July 13, 1988 remanding this case to the Iowa District Court. After careful consideration of all briefs and arguments presented in this case, it is the decision of this court that defendants' motion is denied, and the court sustains and readopts its order of July 13, 1988 remanding this case.

The court reminds all parties that although it remanded the case to Iowa District Court, it did render an opinion on the part of plaintiff's claim that relates to truth in lending. This court remains convinced that Congress did not give states or state officials standing to seek relief in federal court for violations of the Truth-in-Lending Act suffered by their citizens. Furthermore, Congress did not provide any private citizen with a cause of action to seek relief against advertisements which violate two of the three TILA provisions relied upon by the plaintiff. The plaintiff's complaint cites three sections of the TILA – §§ 1662, 1664 and 1667(c). Sections 1662 and 1664 – concerning credit advertising – were contained in part C (previously called Chapter 3) of the TILA. Section 1667(c) – concerning leasing advertising – was later added when part E was enacted in 1976. As the Eighth Circuit recognized in *Jordan v. Montgomery Ward & Co.*, 442 F.2d 78 (8th Cir. 1971), "it was the intent of Congress not to provide

private parties civil relief for violations of the credit advertising provisions [of part c]." 442 F.2d at 81. Indeed, the legislative history could not be more clear on this point:

> The bill specifically exempts credit advertising from the application of civil penalties. This exception has been written into the bill by your committee to avoid the possibility that anyone, not a party to an actual transaction, seeing an advertisement not complying with the disclosure requirements of the bill would attempt to seek civil penalties.

H. Rep. No. 1040, 90th Cong., 2d Sess. (1968), reprinted in the 1968 U. S. Code & Admin. News 1962, 1976.

The plaintiff has admitted it is not a "private party." Despite the fact that Iowa has adopted its own TIL law, Iowa authorities cannot exercise broader civil relief under their rule than was intended by Congress. In the court's July 12, 1988 order, the court noted that the congressional intent is less clear as it relates to the leasing advertising provisions under section 1667(c). The court stated at that time, however, that, as not all the cases involved leasing advertising, "[t]he minor federal interest in having a federal court resolve the legality of the leasing advertisements is not great enough to outweigh the impracticality of keeping three cases and sending two back to state court." (Court's July 12 Order at 9.) Therefore, the court ordered the entire case remanded.

Upon review of this matter, the court now believes it would be appropriate to clarify its opinion as it relates to the leasing advertising provisions of section 1667(c). The Eighth Circuit's decision In *Jordan v. Montgomery Ward,*

which clearly provided that private parties lacked standing to bring suit under the Act, was limited to the credit advertising provisions of the Act. *See Jordan*, 442 F.2d at 81. Section 1667(c), the section concerning leasing advertising, was not added to the Truth-in-Lending Act until 1976. Therefore, when *Jordan* was decided, the Eighth Circuit did not have in front of it section 1667(c). Therefore, when the *Jordan* court says "it was the intent of Congress not to provide private parties civil relief for violations of the credit advertising provisions [of part c]", it may be that the only reason they did not mention section 1667(c) is because it did not exist. These dates are significant. The principles behind the *Jordan* decision would likewise apply to section 1667(c). The question to ask is, is there some inherent difference in section 1667(c), in comparison with the other two sections, which would distinguish it, allowing the state to maintain a cause of action under this section of the Act, but not under any other sections of the Act? The court believes that there is nothing inherent about section 1667(c) which would distinguish it from the other sections. The principle underlying the Eighth Circuit's decision in *Jordan* is that Congress sought to preclude anybody, except those individuals who actually purchase a product because of the deceptive advertising or leasing provisions, to sue. The Congressional intent was to preclude the existence of private attorneys general from maintaining a suit under this Act. The leasing provisions under section 1667(c) is not such a different quality or directed at inherently distinguishable practices to dispel this congressional intent.

Defendants have further argued that the federal TILA provisions preempt state actions for TIL violations. This is not the law (*see* 15 U.S.C. § 1610(a)(1)).

The court denies the plaintiff's request for attorney fees and "costs" of litigation except that the clerk, as always, may review a bill of costs filed by the plaintiff and approve those costs deemed appropriate as in any other case. This case involved hard, close legal calls that the defendants had every right to pursue without any liability for "improvident removal."

IT IS THEREFORE ORDERED that defendants' motion to reconsider the court's order remanding this case is denied.

IT IS FURTHER ORDERED that the plaintiff's request for attorneys' fees and costs, except as set out above, are denied.

December 23, 1988.

/s/ Donald E. O'Brien
Donald E. O'Brien, Judge
UNITED STATES DISTRICT COURT

APPENDIX N

STATE OF IOWA
DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
CONSUMER PROTECTION DIVISION
AFFIDAVIT

STATE OF IOWA)
COUNTY OF POLK) ss:
)

I, Holly Merz, am a Consumer Protection investigator for the plaintiff State of Iowa. Being first duly sworn, under oath, I do state & depose that the following is true to the best of my knowledge and belief.

On March 15, 1989, I spoke by phone with Terry Aushenbaugh of the *Omaha World Herald*, telephone number 402-444-1000, and obtained the following information:

1) Current total sales of the Sunday edition of the *Omaha World Herald* consist of 288,779 editions, per Sunday.

2) Current total subscription sales of the Sunday edition of the *Omaha World Herald* consist of 257,082 papers, per Sunday.

3) Current total sales of the Sunday edition of the *Omaha World Herald* in the State of Iowa is 33,124.

Therefore, Iowa sales of the Sunday edition of the *Omaha World Herald* constitute approximately 11.5% of the total sales of that newspaper.

Further, affiant sayeth not.

Dated this 16th day of March, 1989.

/s/ Holly Merz
HOLLY MERZ

Subscribed and sworn to before me on this 16th day of March, 1989.

/s/ Kathern M. Smith
NOTARY PUBLIC

APPENDIX O

SEAL

DEPARTMENT OF JUSTICE

CONSUMER PROTECTION DIVISION

ADDRESS REPLY TO
HOOVER BLDG. SECOND FLOOR
1300 EAST WALNUT
DES MOINES, IOWA 50319
515-281-5926

ENFORCEMENT GUIDELINES

The Iowa Consumer Fraud Act (Iowa Code § 714.16(2)(a) (1985)) and Motor Vehicle Advertising

Revised February 1987

These guidelines were developed after extensive review of automobile advertisements in the State of Iowa. The Attorney General's Office will continue to monitor automobile advertising and additional guidelines will be added to this list, if necessary.

It is the position of the Consumer Protection Division of the Office of the Iowa Attorney General that to advertise motor vehicles by use of the following terms in the manner described constitutes a deceptive and misleading practice in violation of section 714.16(2)(a) and may subject the violator to suit by the Attorney General under section 714.16(7) of the Iowa Consumer Fraud Act. Under the Consumer Fraud Act, section 714.16(1)(a), "the term advertisement includes the attempt by publication, dissemination, solicitation or circulation to induce directly or indirectly any person to enter into any obligation or acquire any title or interest in any merchandise."

Definitions

The following definitions apply to, and are a part of, the guidelines below.

(a) The term "dealer's cost" or words of similar import or meaning must refer to the actual cost to the dealer of any vehicle or part thereof delivered to the dealer's place of business. "Dealer's cost" or words of similar import do not include expenses incurred by the dealer such as flooring, overhead, commissions, dealer advertising, or other costs.

(b) The term "demonstrator" or words of similar import or meaning must refer to newer model motor vehicles which have been driven at least 1,000 miles by dealer employees or prospective customers of that or another dealership selling the vehicle.

(c) The term "driver education vehicle" refers to a new vehicle leased to or purchased by a school district for the main purpose of teaching students to drive.

(d) The term "excecutive vehicle" or words of similar import or meaning must refer to a vehicle which has been purchased directly from the manufacturer or subsidiary of the manufacturer and which has been used exclusively by the manufacturer, it subsidiary or by a dealer for its employees.

(e) The term "leased vehicle" or words of similar import refer to a vehicle which has been driven for a specific period of time under a lessor-lessee agreement.

(f) The term "newer model motor vehicle" refers to a motor vehicle which is of the current or previous model

year. For example, during the 1987 model year, this term would apply to 1986 and 1987 motor vehicles.

(g) The term "rental vehicle" refers to a vehicle which has been offered to the public for business or pleasure driving for short periods of time, usually on a daily or weekly basis.

Guidelines

1. An advertisement for a newer model motor vehicle which has been used as an executive vehicle or has been leased or rented on a fleet or individual basis:

(a) must clearly and conspicuously indicate in the advertisement that the vehicle has been previously driven; for example,

i) "DRIVEN AS AN EXECUTIVE VEHICLE"

ii) "DRIVEN AS A LEASED VEHICLE"

iii) "DRIVEN AS A RENTAL VEHICLE"

iv) "DRIVEN AS A DEALER DEMONSTRATOR"

v) "DRIVEN AS A DRIVER EDUCATION VEHICLE"

vi) "USED"

or, in the alternative, must clearly and conspicuously indicate the mileage of an individual vehicle or a range of mileage for a group of vehicles,

and

(b) may not use the terms "list price," "suggested list price," "current list price" or similar terms as a means of implying that the dealer's

current selling price represents a certain savings from "list price." However, the "list price" of the vehicle when the vehicle was new may be used in the advertisement by using the phrase "list when new. . . . "

2. An advertisement for a motor vehicle may not use the phrases "dealer's cost," "at cost" or similar terms unless the advertisement clearly and conspicuously provides to the dealer or in the alternative states that the dealer's profit on the vehicle is not limited to the amount of dollars charged over "dealer's cost."

Example: Dealer's cost may not reflect the actual cost to the dealer.

3. An advertisement for a motor vehicle may not use the phrases "over invoice" or "under invoice" or words of similar import unless the advertisement also clearly and conspicuously states that the dealer's profit is not limited to the amount of dollars charged over invoice.

Example: Invoice may not reflect actual cost to dealer.

Invoice may not reflect dealer holdback and/or incentives.

Notwithstanding the above, if the invoice is the actual price to the dealer and the dealer can substantiate this fact, no further disclosure is needed.

4. An advertisement for a motor vehicle may not advertise a certain dollar amount of savings or discount unless it clearly and conspicuously provides the basis for the savings or discount. In order for an advertised discount or savings to be offered from the advertiser's "former or regular price," "list price," or "manufacturer's

suggested retail price (MSRP)" the price indicated as a former or regular price, list price or MSRP must be an actual bonafide price at which the motor vehicle was regularly advertised and openly and actively offered to the public on a regular basis for a reasonably substantial period of time in the recent course of the advertiser's business.

See Examples #1 and #2 – Attachment A for a correct use of list or MSRP as a benchmark or reference price.

See Example #3 – Attachment A for a questionable "Sale" advertisement.

5. No advertisement for a motor vehicle may advertise a "sale" as one of limited duration which will end on a particular date and then upon that date or shortly thereafter advertise that the same "sale" has been extended.

Example #1

Example #2

13a

CORRECT

Example #3

CORRECT – ONLY IF the vehicles were regularly offered for sale at the list price.

No. 90-583

In The

Supreme Court of the United States

October Term, 1990

BAXTER CHRYSLER PLYMOUTH, INC.,

and

JOHN MARKEL, INC., d/b/a
MARKEL FORD, et al.

and

JOHN KRAFT CHEVROLET, INC.,
d/b/a JOHN KRAFT CHEVROLET-ISUZU, INC.

and

STAN OLSEN PONTIAC, INC., d/b/a OLSEN AUTO
WORLD and OLSEN FAMILY DISCOUNT CENTER,

Petitioners,

vs.

THE STATE OF IOWA, ex-rel.
THOMAS J. MILLER, Attorney General of Iowa,

Respondent.

Petition For Writ Of Certiorari To The Iowa Supreme Court

REPLY TO BRIEF IN OPPOSITION

MARK A. WEBER,
Attorney of Record
JAMES D. SHERRETS
LISA M. FAISANT
SHERRETS, SMITH & GARDNER
Regency Professional Plaza
260 Regency Parkway Drive
Omaha, Nebraska 68114
(402) 390-0404

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

PARTIES TO THE PROCEEDING

The named appellant in the Supreme Court for the State of Iowa, and the only respondent here is Thomas J. Miller, Attorney General for the State of Iowa.

The named appellees in the Supreme Court for the State of Iowa, and the only petitioners here, are Baxter Chrysler Plymouth, Inc., John Markel Ford, Inc. d/b/a Markel Ford, John Kraft Chevrolet, Inc., d/b/a John Kraft Chevrolet-Isuzu, Inc., and Stan Olsen Pontiac, Inc., d/b/a Olsen Auto World. Dean Rawson Nissan, Inc. was dismissed following the decision of the Iowa Supreme Court and therefore is not taking part in this Petition for Writ of Certiorari. The Supreme Court of Iowa affirmed the decision of the Iowa District Court dismissing the individual defendants for lack of personal jurisdiction, but reversed the decision as to the corporate defendants. A list of all parent and subsidiary companies is contained in the Petition for Writ of Certiorari at page ii.

ARGUMENT

I. THE IOWA CONTACTS OF THE DEALERS ARE INSUFFICIENT TO SUBJECT THEM TO THE PERSONAL JURISDICTION OF IOWA COURTS

It is necessary for Petitioners to clarify the extent of their contacts with the forum State of Iowa. The quantity of contacts between the Dealers and the forum state of Iowa is insignificant at best and is not the result of any attempt by the Petitioners to serve the Iowa market. The Petitioners do no business in Iowa, do not maintain offices in Iowa, and do not send agents into Iowa. The only contacts relevant to these actions are the incidental contacts through advertisements in a Nebraska newspaper which, against the request of Petitioners, gets delivered into Iowa by the newspaper itself and not by the Petitioners. The Iowa Attorney General asserts that by advertising in the Nebraska newspaper, the *Omaha World Herald*, the Petitioners have sought to serve the Iowa market. Respondent also argues that the advertisements in the telephone book of Council Bluffs, Iowa should be considered contacts for purposes of the "minimum contacts analysis". However, these advertisements in the telephone book are unrelated to the claims asserted against Petitioners, nor were these advertisements alleged in Respondent's petitions. Therefore, only the Petitioners' contacts through the *Omaha World Herald* should be considered in determining whether there are sufficient contacts with the State of Iowa to warrant the assertion of personal jurisdiction.

At the time material to the allegations of the Iowa Attorney General, the paid circulation of the *Omaha World Herald* was 301,916 on Sunday and 224,269 for the daily,

of which 5700 Sunday and 3700 daily are subscriptions in Council Bluffs, Iowa, for a percentage of 1.79%. App. D to the Petition, p. 35a. The total circulation of the Sunday newspaper to Iowan's (32,700) constitutes only 1.2% of the total Iowa population.[1] App. A to the Petition, p. 5a.

In view of these statistics, it is clear that the Petitioners' contacts with Iowa are insignificant. By advertising in a Nebraska newspaper, these Nebraska car dealers have not sought to invoke the benefits and protections of Iowa law. Nor have they "purposefully availed" themselves of the privilege of doing business in Iowa. There simply are no allegations that the Petitioners do any business in Iowa. Consequently, the assertion of personal jurisdiction over Petitioners by the Supreme Court of Iowa is violative of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and is contrary to "traditional notions of fair play and substantial justice." *International Shoe Company v. Washington*, 326 U.S. 310, 316 (1945).

II. THE CASES CITED IN THE BRIEF IN OPPOSITION ARE FACTUALLY DISTINGUISHABLE FROM THE PRESENT ACTIONS

Respondent relies on cases which involve a greater degree of contacts by the nonresident defendants with the forum state than Petitioners have with the State of Iowa. For example, Respondent cites *Ex parte Pope Chevrolet, Inc. (Re Emmie Wallace v. Pope Chevrolet, Inc., et al.)*, 555 So.2d

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[1] Based upon a total Iowa population of 2,834,000 as indicated by the Iowa Bureau of Vital Statistics.

109 (Ala. 1989) as being a case which is "nearly identical" to the present actions. In fact, that case is very different from these claims being pursued by the Iowa Attorney General against these Nebraska car dealers based upon advertisements in Nebraska medium. In *Pope*, there was a real plaintiff pursuing a claim based upon an actual sale of an automobile. In the present case, there are no allegations of any automobile sales by any of the car dealers to residents of Iowa. There simply is no plaintiff who is alleging he or she has been injured as a result of Petitioners' advertisements in the *Omaha World Herald*.

Other cases cited by Respondent involve the assertion of jurisdiction over the nonresident publishers or writers of libelous publications or articles such as *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) and *Calder v. Jones*, 465 U.S. 783 (1984). The present case is clearly distinguishable. In the first place, the *Omaha World Herald* does not enjoy a national circulation. It is a local publication which has approximately 98% of its circulation in Nebraska. It must also be emphasized that Petitioners are Nebraska retailers advertising in a Nebraska newspaper. They are not the publishers of the *Omaha World Herald* and they therefore do not control the circulation of the paper as did the defendants in *Keeton v. Hustler Magazine, Inc.*

CONCLUSION

The decision of the Iowa Supreme Court is in conflict with the decisions of this Court, federal appellate and district courts, and state appellate courts. The assertion of personal jurisdiction by the Iowa courts over these Nebraska car dealers based upon advertisements placed in a Nebraska newspaper is violative of the constitutional guarantee of the due process clause.

The only contacts Petitioners have with the forum State of Iowa are their advertisements placed in a Nebraska newspaper over which they have no control. As a result of the conduct of the newspaper, and not that of Petitioners, a small number of these newspapers have incidental circulation into Iowa. Such tenuous contacts are not sufficient to afford a basis for the assertion of personal jurisdiction over Petitioners within the limits imposed by the Constitution and the guidelines promulgated by this Court.

The issue of personal jurisdiction must be decided on a case by case basis by examining the nature, quality and quantity of the nonresident defendants contacts with the forum state as well as the interest of the forum state in maintenance of the suit. When these factors are considered in this matter, it appears that the Supreme Court of Iowa has found the assertion of personal jurisdiction over Petitioners is proper. However, in a number of other cases, this Court and others have found such an assertion would be violative to the due process clause where there was a greater degree of contact with the forum state. For

these reasons, Petitioners respectfully request that this Court issue a Writ of Certiorari.

Respectfully submitted,

MARK A. WEBER,
Attorney of Record
JAMES D. SHERRETS
LISA M. FAISANT
SHERRETS, SMITH & GARDNER
260 Regency Parkway Drive
Omaha, Nebraska 68114
(402) 390-0404

Attorneys for Petitioners

APPENDIX F

60-1411.03. Unauthorized acts. It shall be unlawful for any licensee to engage, directly or indirectly, in the following acts:

(1) To advertise and offer any year, make, engine size, model, type, equipment, price, trade-in allowance, terms, or make other claims or conditions pertaining to the sale, leasing, or rental of motor vehicles, motorcycles, and trailers which are not truthful and clearly set forth;

(2) To advertise for sale, lease, or rental a specific motor vehicle, motorcycle, or trailer which is not in possession of the dealer, owner, or advertiser and willingly shown and sold, as advertised, illustrated, or described, at the advertised price and terms, at the advertised address. Unless otherwise specified, a motor vehicle, motorcycle, or trailer advertised for sale shall be in operable condition and on request, the advertiser thereof shall show records to substantiate an advertised offer;

(3) To advertise a new motor vehicle, motorcycle, or trailer at a price which does not include standard equipment with which it is fitted or is ordinarily fitted, without disclosing such fact, or eliminating any such equipment for the purpose of advertising a low price;

(4) To advertise (a) that the advertiser's prices are always or generally lower than competitive prices and not met or equalled by others or that the advertiser always or generally undersells competitors; (b) that the advertiser's prices are always or generally the lowest or

that no other dealer has lower prices; (c) that the advertiser is never undersold; or (d) that no other advertiser or dealer will have a lower price;

(5) To advertise and make statements such as, Write Your Own Deal, Name Your Own Price, Name Your Own Monthly Payments, and other statements of a similar nature;

(6) To advertise by making disparaging comparisons with competitors' services, quality, price, products, or business methods;

(7) To advertise by making the layout, headlines, illustrations, and type size of an advertisement so as to convey or permit an erroneous impression as to which motor vehicle, motorcycle, or trailer or motor vehicles, motorcycles, or trailers are offered at featured prices. No advertised offer, expression, or display of price, terms, down payment, trade-in allowance, cash difference, or savings shall be misleading by itself, and any qualification to such offer, expression, or display shall be clearly and conspicuously set forth in comparative type size and style, location, and layout to prevent deception;

(8) To advertise the price of a motor vehicle, motorcycle, or trailer without including all charges which the customer must pay for the motor vehicle, motorcycle, or trailer, excepting state and local tax and license and title fees. It shall be unlawful to advertise prices described as unpaid balance, unless they are the full cash selling price and to advertise price which is not the full selling price even though qualified with expressions such as with trade, with acceptable trade, or other similar words;

(9) To advertise as at cost, below cost, below invoice, or wholesale, unless the term used shall be strictly construed that the word cost, as used above or in a similar meaning, shall be the actual price paid by the advertiser to the manufacturer for the motor vehicle, motorcycle, or trailer so advertised;

(10) To advertise claims that Everybody Financed, No Credit Rejected, We Finance Anyone, and other similar affirmative statements;

(11) To advertise a specific trade-in amount, or range of amounts;

(12) To advertise the words Finance, Loan, Discounts, or others of similar import, in the firm name or trade style of a person offering motor vehicles, motorcycles, and trailers for sale, unless such person is actually engaged in the finance business and offering only bona fide repossessed motor vehicles, motorcycles, and trailers. It is unlawful to use the word Repossessed in the name or trade style of a firm in the advertising of motor vehicles, motorcycles, and trailers sold by such a company unless they are bona fide repossessions sold for unpaid balances due only. Advertisers offering repossessed automobiles for sale must be able to offer proof of repossession.

(13) To advertise the term Authorized Dealer in any way as to mislead as to the make or makes of motor vehicles, motorcycles, or trailers for which a dealer is franchised to sell at retail;

(14) To advertise or sell new motor vehicles, motorcycles, and trailers by any person not enfranchised by the

manufacturer of the motor vehicle, motorcycle, or trailer offered without disclosing of the fact that the licensee is not enfranchised by the manufacturer for service under factory warranty provisions;

(15) To advertise used motor vehicles, motorcycles, or trailers so as to create the impression that they are new. Used motor vehicles, motorcycles, and trailers of the current and preceding model year must be clearly identified as Used, Executive Driven, Demonstrator, or Driver Training, and lease cars, taxicabs, fleet vehicles, police motor vehicles, or motorcycles as may be the case and descriptions such as Low Mileage, Slightly Driven may also be applied only when correct. The terms demonstrator's, executive's, and official's motor vehicles, motorcycles, or trailers shall not be used unless they have never been sold to a member of the public and unless such terms describe motor vehicles, motorcycles, or trailers used by new motor vehicle, motorcycle, or trailer dealers or their employees for demonstrating performance ability and unless such vehicles are advertised for sale as such only by an authorized dealer in the same make of motor vehicle, motorcycle, or trailer. Phrases such as Last of the Remaining, Closeout, Final Clearance, and others of similar import shall not be used in advertising used motor vehicles, motorcycles, and trailers so as to convey the impression that the motor vehicles, motorcycles, and trailers offered are holdover new motor vehicles, motorcycles, and trailers. When new and used motor vehicles, motorcycles, and trailers of the current and preceding model year are offered in the same advertisement, such offers shall be clearly separated by description, layout, and art treatment;

(16) To advertise executives' or officials' motor vehicles, motorcycles, or trailers unless they have been used exclusively by the personnel or executive of the motor vehicle, motorcycle, or trailer manufacturer or by an executive of any authorized dealer of the same make thereof and such motor vehicles, motorcycles, and trailers have not been sold to a member of the public prior to the appearance of the advertisements;

(17) To advertise motor vehicles, motorcycles, and trailers, owned by or in the possession of dealers, without the name of the dealership or in any other manner so as to convey the impression that they are being offered by private parties;

(18) To advertise the term wholesale in connection with the retail offering of used motor vehicles, motorcycles, and trailers;

(19) To advertise terms auction or auction special and other terms of similar import unless such terms shall be used in connection with motor vehicles, motorcycles, and trailers offered or sold at a bona fide auction to the highest bidder and under such other specific conditions as may be required in this act;

(20) To advertise free driving trial, unless it means a trial without obligation of any kind and that the motor vehicle, motorcycle, or trailer may be returned in the period specified, without obligation or cost. A driving trial advertised on a money back basis or with privilege of exchange or applying money paid on another motor vehicle, motorcycle, or trailer shall be so explained. Terms and conditions of driving trials, free or otherwise, shall be set forth in writing for the customer;

(21) To advertise (a) the term Manufacturer's Warranty, unless it is used in advertising only in reference to cars covered by a bona fide factory warranty for that particular make of motor vehicle, motorcycle, or trailer. In the event only a portion of such warranty is remaining, then reference to a warranty may be used only if stated that that unused portion of the warranty is still in effect; (b) the term New Car Guarantee, except in connection with new motor vehicles, motorcycles, and trailers; and (c) the terms Ninety-day Warranty, Fifty-fifty Guarantee, Three hundred mile Guarantee, and Six-month Warranty, unless the major terms and exclusions are sufficiently described in the advertisement;

(22) To advertise representations inconsistent with or contrary to the fact that a motor vehicle, motorcycle, or trailer is sold as is and without a guarantee. The customer contract shall clearly indicate when a car will be sold with a guarantee and what that guarantee is, and similarly shall clearly indicate when a car is sold as is and without a guarantee; and

(23) To advertise or to make any statement, declaration, or representation in any advertisement that cannot be substantiated in fact, and the burden of proof of the factual basis for such statement, declaration, or representation is on the licensed dealer and not on the board.

Source: Laws 1971, LB 768, § 13; Laws 1972, LB 1335, § 10; Laws 1974, LB 754, § 11; Laws 1980, LB 820, § 3; Laws 1984, LB 825, § 18.
Effective date April 10, 1984.

APPENDIX G

IN THE IOWA DISTRICT COURT
FOR POTTAWATTAMIE COUNTY

THE STATE OF IOWA ex rel. THOMAS J. MILLER, ATTORNEY GENERAL OF IOWA, Plaintiff, v. BAXTER CHRYSLER PLYMOUTH, INC. and TALTON K. ANDERSON, in his corporate capacity as President of Baxter Chrysler Plymouth, Inc. Defendants.	EQUITY NO. 58534 PETITION (Filed Sept. 4, 1987)

COMES NOW the Plaintiff, the State of Iowa, by Thomas J. Miller, Attorney General of the State of Iowa, and Linda Thomas Lowe, Assistant Attorney General, and for its cause of action states:

I.

1. The Plaintiff, the State of Iowa ex rel. Thomas J. Miller, Attorney General of Iowa, is empowered pursuant to the *Iowa Consumer Fraud Act*, Iowa Code § 714.16, H.F. 416, 72 G.A., 1st Sess. (Iowa 1987) (hereinafter referred to as Iowa Code § 714.16 (1987) as amended) and the *Iowa Consumer Credit Code*, Iowa Code §§ 537.6104(2), 537.6110,

537.6112, and 537.6113 (1987) to initiate this action seeking injunctive relief, a civil penalty, restitution and recovery of costs for the use of the State, including court costs.

2. The Attorney General is the Administrator of the Iowa Consumer Credit Code, Iowa Code § 537.6103 (1987), and in this capacity may enforce the federal Truth-In-Lending Act, 15 U.S.C. 1601, et seq. (hereinafter referred to as the federal Truth-In-Lending Act) to the fullest extent of the law. Iowa Code § 537.6104(2) (1987).

3. Thomas J. Miller is the duly elected, qualified, and acting Attorney General of the State of Iowa.

4. William E. Mooney, Jr. is the registered agent for service of process on the Defendants with a business address of 1800 First National Center, Omaha, Nebraska 68102.

5. Defendant Baxter Chrysler Plymouth, Inc. is a Nebraska corporation whose principal place of business is 11910 West Dodge road, Omaha, Nebraska 68154.

6. The term Defendants shall refer to both Defendant Talton K. Anderson and Defendant Baxter Chrysler Plymouth, Inc. unless otherwise specifically designated.

II.

7. The Iowa District Court has jurisdiction of this action pursuant to Iowa Code §§ 537.1201(1)(c), 537.1203, 537.6104(2) (1987) and § 714.16(7) as amended.

8. Defendants have offered for sale or lease to Iowans motor vehicles through advertisements in the Iowa edition of the Omaha World Herald which is a

newspaper sold, distributed, and delivered in Iowa to Iowans and on WOWT television which is an Omaha/ Council Bluffs television station viewed by Iowans.

9. On information and belief, Iowans have purchased motor vehicles for their use in Iowa from the Defendants based on these advertisements.

10. Defendants' advertisements are governed by the Iowa Consumer Credit Code, Iowa Code § 537.3209 (1987); the federal Truth-In-Lending Act, 15 U.S.C. §§ 1662, 1664 and 1667c (1987), Regulation Z – 12 C.F.R. § 226.24 (1987) and Regulation M – 12 C.F.R. § 213.5 (1987); and the Iowa Consumer Fraud Act, Iowa Code § 714.16(2)(a) (1987) as amended.

11. Iowa Code § 537.3209 (1987), the Iowa Consumer Credit Code provides as follows:

> A seller, lessor, or lender shall not advertise, display, publish, distribute, utter, or broadcast, or cause to be advertised, printed, displayed, published, distributed, uttered, or broadcast in any manner, any false, misleading, or deceptive statement or representation with regard to the rates, terms or conditions of credit with respect to a consumer credit transaction.

12. Incorporated in the Iowa Consumer Credit Code, the federal Truth-In-Lending Act, and regulations promulgated thereunder, specifically 12 C.F.R. § 226.24(a)-(c) and § 226.24 Comment 1 (1987) provide:

> (a) If an advertisement for credit states specific credit terms, it shall state only those terms that actually are or will be arranged by the creditor.

(b) If an advertisement states a rate of finance charge, it shall state the rate as an "annual percentage rate," using that term. If the annual percentage rate may be increased after consummation, the advertisement shall state that fact. The advertisement shall not state any other rate, except that a simple annual rate or periodic rate that is applied to an unpaid balance may be stated in conjunction with, but not more conspicuously than, the annual percentage rate.

(c) If an advertisement states the amount or percentage of any downpayment, the number of payments or period or repayment, the amount of any payment, or the amount of any finance charge, the advertisement must also state the following terms:

i. The amount or percentage of the downpayment.

ii. The terms of repayment.

iii. The "annual percentage rate," using that term, and, if the rate may be increased after consummation, that fact.

and 12 C.F.R. § 213.5(a) and (c) (1987) provide:

(a) No advertisement to aid, promote or assist directly or indirectly any consumer lease may state that a specific lease of any property at specific amounts or terms is available unless the lessor usually and customarily leases or will lease such property at those amounts or terms.

* * *

(c) If an advertisement for a consumer lease states the amount of any payment, the number of required payments, or that any or no downpayment is required at consummation of the lease, the advertisement must also clearly and conspicuously state:

i. That the transaction advertised is a lease.

ii. The total amount of any payment such as a security deposit required at the consummation of the lease or that no such payment is required.

iii. A payment schedule.

iv. A statement of whether the customer has the option to purchase the leased property.

v. A statement about the amount of any liability the lease imposes upon the customer at the end of the term.

In addition, all advertisements governed by 12 C.F.R. § 226.24(a)-(c) are subject to a "clear and conspicuous" standard as provided in Comment 1, 12 C.F.R. § 226.24(a)-(c).

13. Iowa Code Section 714.16(2)(a) (1987) as amended provides as follows:

> pretense, false promise, or misrepresentation, or the concealment, suppression, or omission of a material fact with intent that others rely upon the concealment, suppression, or omission, in connection with the lease, sale, or advertisement of any merchandise, whether or not a person has in fact been misled, deceived, or damaged, is an unlawful practice.

III.

14. Defendants were advised by the Plaintiff by certified letter on or about November 26, 1986, that certain of their advertisements violated 12 C.F.R. §§ 226.24 and 213.5 (1986) and the Iowa Consumer Fraud Act, Iowa Code § 714.16(2)(a) (1986). A letter signed by Defendant

Anderson was returned on or about December 18, 1986, to the Attorney General acknowledging that Defendants had been advised of the violations and the Defendants' duty to comply with the advertising statutes. A copy of the plaintiff's November letter and the Defendant's acknowledgement are attached to this Petition as Exhibits A and B.

IV.

15. Defendants' advertisements, in the Iowa Edition of the Omaha World Herald and on Channel WOWT (Omaha) television have violated Iowa Code Section 714.16(2)(a) (1987) as amended, by using unfair practices, deception, or misrepresentation or by having concealed, suppressed, or omitted material facts with intent that others rely upon such concealment, suppression, or omission in connection with the advertisement for sale of motor vehicles including, but not limited to, the following specifics:

(a) On February 8, and February 10, 1987, the Defendants violated Iowa Code § 714.16(2)(a) in their advertisements in the Omaha World Herald, by using the term "list" to imply that the Defendants' current selling price represents a "sale" from the "list" price because Defendant customarily sold these cars at "list." (*See* Exhibits 1 and 2.)

(b) Defendants advertisements in the Omaha World Herald on January 25, 26, and 29, 1987, June 20, 1987, and July 22, 1987, and their Channel WOWT (Omaha) television advertisements on or about August 12, 1987, violated Iowa Code § 714.16(2)(a) by not giving a reasonable basis

for the advertised "discount." (*See* Exhibits 3, 4, and 5.)

§ 714.16(2)(a) by offering a "free" blue fox fur coat with the purchase of a new car, thereby baiting the consumer to purchase a car from the Defendants failing to disclose that the cost of the fur coat was included in the sale price of the car as opposed to being "free." (*See*: Exhibits 3 and 6.)

(d) On May 30, June 7, June 11, and June 18, 1987, Defendants violated Iowa Code § 714.16(2)(a) in their advertisements in the Iowa edition of their Omaha World Herald by advertising certain used vehicles as "specials" or as "sale" items when in fact, although the name of the "special" or "sale" event changed (from one advertisement to the next (from "used specials" to "Brass Hat Sale," to "Foreign Car Sale," to "Hail Sale,") the price of specific advertised cars did not necessarily change from "sale" to "sale." (*See*: Exhibits 7, 8, 9 and 10.)

16. Defendants have violated Iowa Code Section 537.3209, 12 C.F.R. § 226.24, and 12 § [sic] C.F.R. 213.5 by making misleading representations in their advertisements for sale or lease of motor vehicles or by omitting mandatory credit terms including, but not limited to, the following specifics:

(a) On January 22, 25, 26, 28, and 29, 1987; February 8, and 10, 1987; March 29, 1987; May 16, May 17, May 26, and May 31, 1987; June 20, 1987; and July 12 and July 22, 1987, Defendants, advertised motor vehicles for sale in the Omaha World Herald and stated a rate of finance charge but did not state it as an "annual percentage rate" in violation of 12 C.F.R. 226.24(b). (*See* Exhibits 11, 3, 6, 1, 2, 12, 13, 14, 4, 15, and 5)

(b) On February 8 and 10, 1987, Defendants advertised a "balloon payment" transaction by conspicuously advertising 47 payments of $181.00 per month and by disclosing in fine print only that the 48th payment equaled $2021.00. In the same advertisements Defendants advertised a low rate of finance (3.7%) which was not available on the $181.00 mo. transaction. This advertisement was not clear and conspicuous and was misleading. (*See* Exhibits 1 and 2)

(c) On June 24 and June 29, 1987, Defendants advertised a 1986 Chrysler by stating the A.P.R. and the number of monthly payments, but Defendants did not state the complete terms of repayment because they omitted the downpayment and the amount of monthly payments. Both of these advertisements were in violation of 12 § C.F.R. 226.24(c)(2)(ii). (*See*: Exhibit 16.)

(d) On January 22, 1987, in their Omaha World Herald advertisement, Defendants advertised a lease for "no money down." The same advertisement also stated that the first payment and a small security deposit were due on delivery. The advertisement violates 12 C.F.R. § 213.5(c)(2) because the Defendants did not clearly and conspicuously disclose: 1) that a payment was required at the consummation of the lease, 2) the total of lease payments, or 3) that the transaction was a lease. (*See* Exhibit 11.)

(e) On January 22, 25 and 28, 1987, Defendants advertised in the Omaha World Herald in violation of 12 C.F.R. § 213.5(c)(5), the amount of the monthly lease payment but in violation of 12 C.F.R. § 213.5(c)(5) did not clearly and conspicuously indicate that the transaction was a lease and omitted the total of lease payments. (*See* Exhibit 6.)

(f) On or about August 12, 1987, Defendants Channel WOWT television advertisements displayed mandatory credit terms that were not clear and conspicuous because the size of the print and the speed of the advertisement rendered the disclosures meaningless.

17. The practices set forth in paragraph 16 above are deceptive and misleading, and therefore also violate the Iowa Consumer Fraud Act, Iowa Code § 714.16(2)(a) (1987) as amended.

V. PRAYER FOR RELIEF

18. It is in the public interest that temporary and permanent injunctive relief be promptly issued to protect the public of the State of Iowa from any further losses from Defendants' illegal conduct.

19. This petition for injunctive relief has not been presented to, or denied, by any other judge of the district court.

20. The State of Iowa is exempt from furnishing bond by the provisions of Iowa R. Civ. P. 9.

WHEREFORE, the Plaintiff prays for relief against the Defendants as follows:

21. After notice and opportunity for hearing, the Court should issue a temporary injunction restraining Defendants from:

(a) advertising, offering for sale or lease, attempting to sell or lease or selling or leasing any goods in violation of 12 C.F.R. § 226.24 and 12 C.F.R. § 213.5 as incorporated in Iowa Code chapter 537, and

(b) advertising motor vehicles through the use of any unfair practice, deception, or misrepresentations and specifically enjoining Defendants from engaging in practices in violation of the laws of the State of Iowa, and federal law as incorporated as set forth in this Petition.

22. The Court should permanently enjoin Defendants from:

(a) advertising, offering for sale or lease, attempting to sell or lease or selling or leasing any goods in violation of 12 C.F.R. § 226.24 and 12 C.F.R. § 213.5 (1987) as incorporated in Iowa Code chapter 537, and

(b) advertising motor vehicles through the use of any practices in violation of the laws of the State of Iowa, and federal law as incorporated, as set forth in this Petition.

23. Order Defendants to pay restitution to Iowans of any money that was acquired by means of any practices referred to above in violation of the Iowa Consumer Fraud Act, Iowa Code § 714.16, as amended.

24. Order Defendants to pay a civil penalty pursuant to Iowa Code § 537.6113(2) (1987) and § 714.16(7) as amended.

25. Order Defendants to pay the state its costs pursuant to Iowa Code §§ 714.16(10), as amended, and 537.6106(1) (1987).

26. Order Defendants to pay all court costs.

27. Grant such further relief as the Court may deem just and equitable.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

RICHARD L. CLELAND
Assistant Attorney General

By: /s/ Linda Thomas Lowe
LINDA THOMAS LOWE
Assistant Attorney General

ATTORNEYS FOR THE PLAINTIFF
Consumer Protection Division
1300 East Walnut, Hoover Bldg.
Des Moines, IA 50319
Phone: (515) 281-5926

We're Over Stocked

We've got to move them out by the end of the month!

Model No. 1328

Plymouth Colt

The Little Japanese Import.

Cash Price $5795

Model No. 6736

New Yorker

Luxurious 4-door Sedan
Fully Equipped.

List.....$17,0420
Sale.....$14972

Cash Back.....$1,000 DIRECT FROM CHRYSLER

Cash Price $13,972

UP TO $1,000 CASH BACK DIRECT FROM CHRYSLER

3.7% FINANCING

7-YEAR 70,000 MILE WARRANTY

Model No. 9078

Lebaron GTS

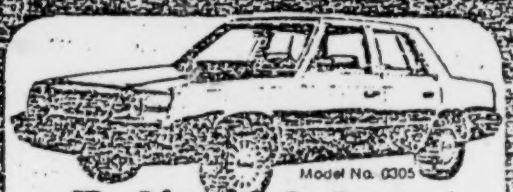
With the European Flavor

Bucket Seats, Automatic, Power Steering, Power Brakes, Air Conditioning, Cruise Control, Tilt Steering Wheel and Light Package.

List.....$11,732
Sale.....$11,059

Cash Back.....$500 DIRECT FROM CHRYSLER

Cash Price $10,559



Model No. 0305

Reliant 4-door

The Economical Family Car

List.....$10,017
Sale.....$9,480

NO PAYMENTS UNTIL AFTER TAX DAY

NO MONEY DOWN $181.00 PER MO.

Chrysler's $500.** Rebate applied to purchase. 47 payments of $181.** at 5.9% A.P.R. 48th payment of $2,021.** with qualified credit.

BAXTER

Dodge Plymouth

11910 West Dodge • 493-7800

Omaha World Herald 2-8-87 pg. 27d

73a

Exhibit 1

Omaha World Herald
2-10-87; pg. 20

Exhibit 2

Omaha World Herald
1-25-87; pg. 3c
1-26-87; pg. 24
1-29-87; pg. 30

Exhibit 3

Omaha World-Herald
June 20, 1987
Pg. 37

Exhibit 4

Omaha World Herald
1-25-87; pg. 28d
1-28-87; pg. 27

Exhibit 6


Stock Number 0697
Plymouth
Horizon America
It's one of America's best Small Car Values...Huge Selection to Choose from.
Lowest Price Ever
$122.00 PER* MO.
*With Qualified Credit. $122 down, 48 month closed end lease, 60,000 miles limited. $125 refundable security deposit. Option to purchase at lease end — price negotiable. Tax and license not included.
Sundance Stock Number 4313
5-Speed Transmission, FrontWheel Drive, AM Radio, Ready to Drive Off our Showroom Floor.
$7969.00
Chrysler Offers:
*3.9%
On Selected Models
Plymouth
BAXTER
20th & W. DODGE 493-7800

Omaha World-Herald
May 30, 1987
pg. 37

Exhibit 7

Omaha Sunday World-Herald
June 7, 1987
Pg. 28-D

BAXTER'S

BRASS HATS SALE

'86 CHEVY CAVALIER

Convertible, automatic, factory air, bright red in color. Cavalier RS convertible has it all plus low miles. The perfect graduation gift.

SAVE

'86 PONTIAC FIERO

5 speed trans., factory air conditioning. Only 9,000 miles on this new car cream puff. ONLY ...

$7995

'84 AUDI 5000 TURBO

The list of options on this car could fill this page, so we'll just say it's double loaded. Should be $13,995. Our Price ...

$10,999

'85 CHRYSLER LEBARON

CONVERTIBLE. Low locococa brought the convertible back. New LeBaron convertibles will be $20,000. This one's only

$8995

'85 BUICK SOMERSET

Equipped with 4 cylinder automatic transmission, factory air conditioning and power windows. Low mileage, balance of factory warranty.

$8995

'87 PLYMOUTH

VOYAGERS. Woodgrain sides, hightback seats, 7 passenger mini van. 5 to choose from, full protection plan available.

$13,995

'86 BUICK RIVIERA

Full power, 6 cyl., automatic, factory air conditioning. Special chamois & leather interior. Balance of factory warranty on this 18,000 mile cream puff. NOW ONLY ...

$13,999

'85 CHRYSLER NEW YORKER

Only 13,000 miles on this local one-owner car. V-8, automatic. Full power. Don't miss this one. Was $14,500. Now ...

$12,950

'86 TOYOTA MR-2

Toyota's most exciting 2 seater sports car. 5 speed transmission, factory air, sun roof, black, Recaro seats. A ton on anybody's scale. Was $12,295, now

$11,240

'85 SAAB 900

Local new car trade with only 30,000 miles. Automatic, air conditioning. Was $12,995. Now ...

$11,850

'86 CHRYSLER LASER

Only 12,000 miles on this local new car trade. 4 cyl., automatic, air conditioning. Was $9295. Now ...

$8440

'87 PLYMOUTH SUNDANCE

This loaded up Factory Rep car has turbo, automatic, full power, air conditioning, and balance of full factory warranty. SAVE thousands over new.

SAVE

'85 MAZDA RX-7

Local one owner car with 5-speed and air conditioning. Only 29,000 miles and the brightest red you've ever seen

$12,450

'84 TOYOTA CAMRY

4 DR LE. Full power, sunroof. A $9 on anybody's scale.

SAVE

BAXTER

120th & W. DODGE RD.

493-7800

Exhibit 8

Omaha World-Herald
June 11, 1987
Pg. 28

Exhibit 9

Omaha World-Herald
June 16, 1987
Pg. 31

same ad – June 18, 1987
pg. 44

Exhibit 10

Omaha World Herald
1-22-87; pg. 51 (reduced from original)

Exhibit 11

Omaha World Herald
3-29-87; pg. 31d

Exhibit 12

Omaha World-Herald
May 16, 1987
pg. 39

same ad – 5-31-87

Exhibit 13

Omaha Sunday World-Herald
May 17, 1987
pg. 32-D

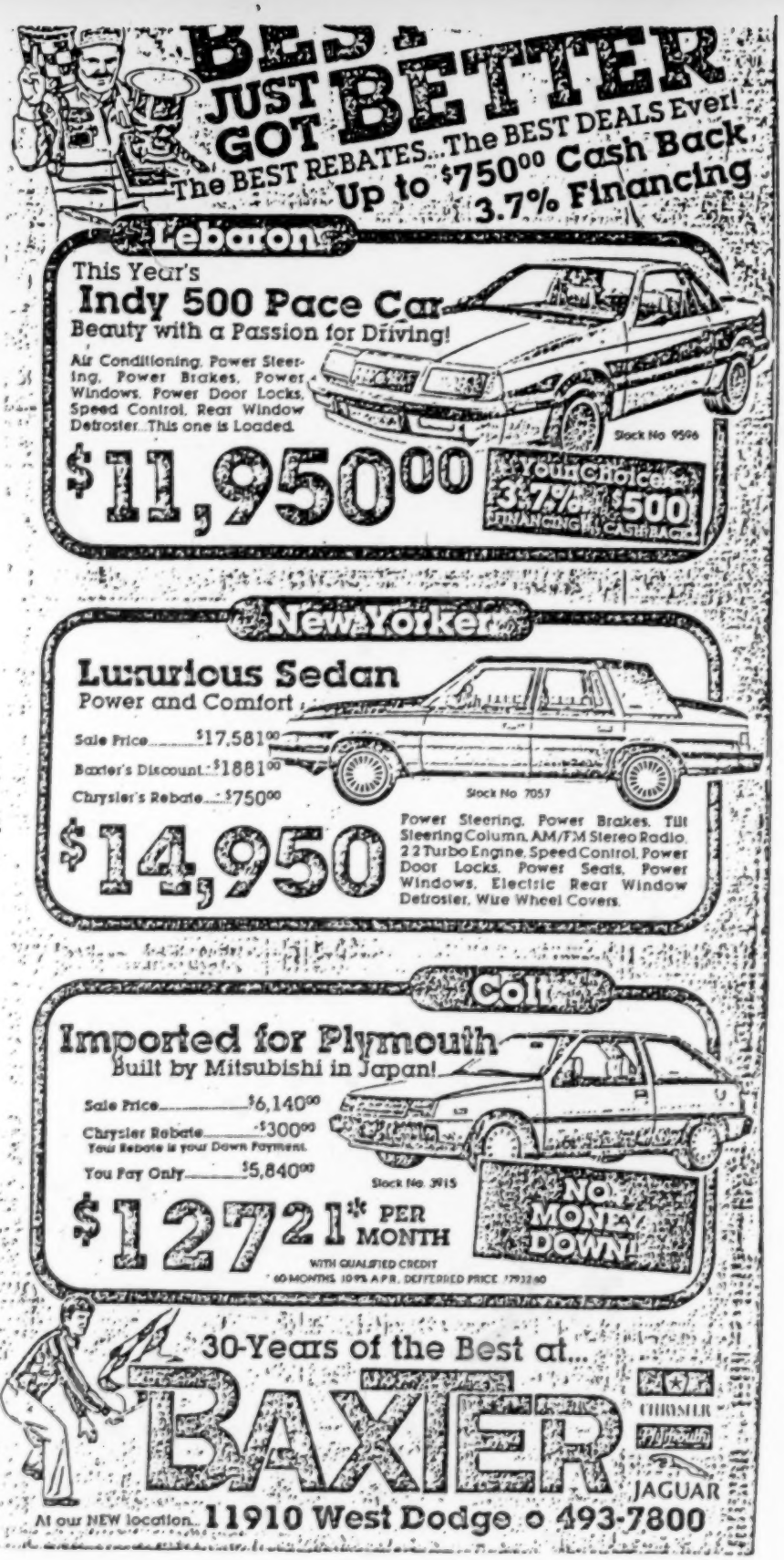


Exhibit 14

Omaha World-Herald
May 26, 1987
Pg. 20

Exhibit 15

OPEN TODAY NOON -4

BEST JUST GOT BETTER

The BEST REBATES...The BEST DEALS Ever!

Up to $750.00 Cash Back

3.7% Financing

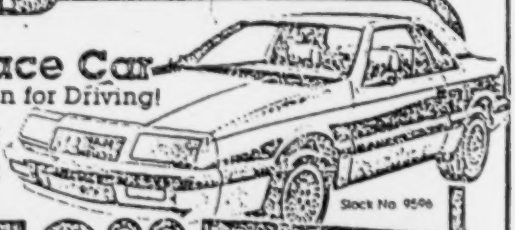
Lebaron

This Year's

Indy 500 Pace Car

Beauty with a Passion for Driving!

Air Conditioning, Power Steering, Power Brakes, Power Windows, Power Door Locks, Speed Control, Rear Window Defroster...This one is Loaded.



Stock No. 9506

$11,950.00

Your Choice 3.7% Financing or $500 Cash Back

New Yorker

Luxurious Sedan

Power and Comfort

Sale Price.....$17,581.00

Baxter's Discount...$1681.00

Chrysler's Rebate...$750.00

Stock No. 7057

$14,950

Power Steering, Power Brakes, Tilt Steering Column, AM/FM Stereo Radio, 2.2 Turbo Engine, Speed Control, Power Door Locks, Power Seats, Power Windows, Electric Rear Window Defroster, Wire Wheel Covers.

Used Cars

'87 CHRYSLER 5th AVENUE — SAVE

'85 GMC SAFARI — SAVE

'86 BUICK RIVIERA — $13,666

'83 OLDS CUTLASS — $8650

'84 AUDI 5000 TURBO — $10,999

'85 CHRYSLER LEBARON — $9500

'87 PLYMOUTH VOYAGERS — $13,999

'86 BUICK SONERSETS — $8999

'84 VOLVO — $12,500

'84 CADILLAC ELDORADO — $15,999

'85 MAZDA RX7 — $12,450

'83 BUICK SKYHAWK — $5450

OPEN TODAY NOON -4

30-Years of the Best at...

BAXTER

CHRYSLER PLYMOUTH JAGUAR

At our NEW location... 120th & West Dodge • 493-7800

Exhibit 16

Omaha World-Herald
July 12, 1987
Pg. 27-D

Reduced Copy

Exhibit 17

Omaha World-Herald
June 24, 1987
Pg. 5
Enlarged

same ad – June 29, 1987
Pg. 20

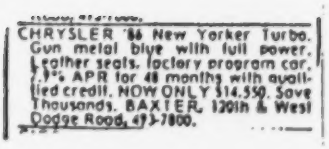

CHRYSLER '86 New Yorker Turbo. Gun metal blue with full power, leather seats, factory program car, 7.9% APR for 48 months with qualified credit. NOW ONLY $14,550. Save Thousands. BAXTER, 120th & West Dodge Road, 493-7800.

Exhibit 18

APPENDIX H

IN THE IOWA DISTRICT COURT
FOR POTTAWATTAMIE COUNTY

THE STATE OF IOWA ex rel. THOMAS J. MILLER, ATTORNEY GENERAL OF IOWA, Plaintiff, v. JOHN KRAFT CHEVROLET, INC., d/b/a JOHN KRAFT CHEVROLET-ISUZU, INC., and JOHN E. KRAFT, in his corporate capacity as President of John Kraft Chevrolet, Inc., Defendants.	EQUITY NO. 58536 **PETITION** (Filed Sept. 4, 1987)

COMES NOW the Plaintiff, the State of Iowa, by Thomas J. Miller, Attorney General of the State of Iowa, and William L. Brauch, Assistant Attorney General, and for its cause of action states:

I.

1. The Plaintiff, the State of Iowa ex rel. Thomas J. Miller, Attorney General of Iowa, is empowered pursuant to the *Iowa Consumer Fraud Act*, Iowa Code § 714.16, H.F. 416, 72 G.A., 1st Sess. (Iowa 1987) (hereinafter referred to as Iowa Code § 714.16 (1987) as amended) and the *Iowa*

Consumer Credit Code, Iowa Code §§ 537.6104(2), 537.6110, 537.6112, and 537.6113 (1987) to initiate this action seeking injunctive relief, a civil penalty, restitution and recovery of costs for the use of the State, including court costs.

2. The Attorney General is the Administrator of the Iowa Consumer Credit Code, Iowa Code § 537.6103 (1987), and in this capacity may enforce the federal Truth-In-Lending Act, 15 U.S.C. § 1601, et seq. (hereinafter referred to as the federal Truth-In-Lending Act) to the fullest extent of the law. Iowa Code § 537.6104(2) (1987).

3. Thomas J. Miller is the duly elected, qualified, and acting Attorney General of the State of Iowa.

4. Defendant John E. Kraft is the President of John Kraft Chevrolet, Inc., and is the registered agent for service of process on the Defendants with a business address of 6120 Military Avenue, Omaha, Nebraska 68134.

5. Defendant John Kraft Chevrolet, Inc. is a Delaware corporation whose principal place of business is 8505 Crown Point Avenue, Omaha, Nebraska 68134.

6. The term Defendants shall refer to both Defendant John Kraft Chevrolet, Inc. and Defendant John E. Kraft unless otherwise specifically designated.

II.

7. The Iowa District Court has jurisdiction of this action pursuant to Iowa Code §§ 537.1201(1)(c), 537.1203, 537.6104(2) (1987), and § 714.16(7) as amended.

8. Defendants have offered motor vehicles for sale to Iowans through advertisements in the Iowa edition of

the Omaha World Herald which is a newspaper sold, distributed, and delivered to Iowans in Iowa.

9. On information and belief, Iowans have purchased or leased motor vehicles for their use in Iowa from the Defendants based on these advertisements.

10. Defendants' advertisements are governed by the Iowa Consumer Credit Code, Iowa Code §§ 537.3209, 537.6104(2) (1987); the federal Truth-In-Lending Act, 15 U.S.C. §§ 1662 and 1664 (1987), and its implementing regulations 12 C.F.R. § 226.24 (1987); and the Iowa Consumer Fraud Act, Iowa Code § 714.16(2)(a) (1987) as amended.

11. Iowa Code § 537.3209 (1987), the Iowa Consumer Credit Code provides as follows:

> A seller, lessor, or lender shall not advertise, display, publish, distribute, utter, or broadcast, or cause to be advertised, printed, displayed, published, distributed, uttered, or broadcast in any manner, any false, misleading, or deceptive statement or representation with regard to the rates, terms or conditions of credit with respect to a consumer credit transaction.

12. Incorporated in the Iowa Consumer Credit Code, the federal Truth-In-Lending Act, and regulations promulgated thereunder, specifically 12 C.F.R. § 226.24(a)-(c), and Comment 1, § 226.24 (1987) provides, in general, that all advertisements of credit terms are subject to a "clear and conspicuous" standard. In particular, § 226.24(a)-(c) provides:

> (a) If an advertisement for credit states specific credit terms, it shall state only those terms that

actually are or will be arranged or offered by the creditor.

(b) If an advertisement states a rate of finance charge, it shall state the rate as an "annual percentage rate," using that term. If the annual percentage rate may be increased after consummation, the advertisement shall state that fact. the advertisement shall not state any other rate, except that a simple annual rate or periodic rate that is applied to an unpaid balance may be stated in conjunction with, but not more conspicuously than, the annual percentage rate.

(c) If an advertisement states the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, the advertisement must also state the following terms:

i. The amount or percentage of the downpayment.

ii. The terms of repayment.

iii. The "annual percentage rate," using that term, and, if the rate may be increased after consummation, that fact.

13. Iowa Code Section 714.16(2)(a) (1987) as amended provides as follows:

The act, use or employment by a person of an unfair practice, deception, fraud, false pretense, false promise, or misrepresentation, or the concealment, suppression, or omission of a material fact with intent that others rely upon the concealment, suppression, or omission, in connection with the lease, sale, or advertisement of any merchandise, whether or not a person has in fact been misled, deceived, or damaged, is an unlawful practice.

III.

14. Defendants were advised by the Plaintiff by certified letter on or about November 26, 1986, that certain of their advertisements violated the federal Truth-In-Lending Act consumer [sic] Consumer Credit Code. Defendant John E. Kraft acknowledged receipt of this letter with a reply letter dated December 10, 1986, however, Defendant Kraft did not sign and return to Plaintiff a proposed agreement that defendant acknowledge the violations and promise to correct future advertisements. A copy of the November letter and Defendant's reply are attached to this Petition as Exhibits A and B.

IV.

15. Defendants in their Omaha World Herald advertisements have violated Iowa Code Section 714.16(2)(a) (1987) as amended, by using deception, unfair practices, or misrepresentation or having concealed, suppressed, or omitted material facts with intent that others rely upon such concealment, suppression, or omission in connection with the advertisement for sale of motor vehicles including, but not limited to, the following specifics:

(a) March 21, 22 and 29, 1987 and April 9, 1987, the Defendants violated Iowa Code § 714.16(2)(a) by using in their advertisements in the Omaha World Herald, the terms "This Week Only," for a "Below Invoice" sale beginning in March 21, 1987 and then extending that sale in advertisements on March 29, 1987 and April 9, 1987. (*See* Exhibits 1, 2, 3, and 4).

(b) On April 29, 1987, May 31, 1987, and June 4, 7, 10, 13, 14, and 18, 1987, Defendants violated Iowa Code § 714.16(2)(a) by using in their

advertisements in the Omaha World Herald, the terms "This Week," for a sale of a, "New! 1986 Isuzu I-Mark." The use of this terminology represented that this was a one-week-only sale. (*See* Exhibits 5-11).

(c) On May 31, 1987 and June 3, 7, and 11, 1987, the Defendants violated Iowa Code § 714.16(2)(a) by using in their advertisements in the Omaha World Herald, the terms, "This-Week," for a sale of a, "New! 1986 Isuzu Spacecab Pickup." the use of this terminology represented that this was a one-week-only sale. (*See* Exhibits 12 and 13).

(d) On June 21, 1987 and July 5, 7, 12, 13, 21, 25 and 26, 1987 and August 2, 1987, the Defendants violated Iowa Code § 714.16(2)(a) by using in their advertisements in the Omaha World Herald, terms "This Week," for a sale of a "New! 1987 Isuzu Pickup." The use of this terminology represented that this was a one-week-only sale. (*See* Exhibits 14A, 14, 15, 16, 17 and 17A).

(e) On February 8, 1987, March 15 and 30, 1987, April 1, 4 and 11, 1987, and May 3, 9, 10, 14, 17, 18, 21,

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

RICHARD L. CLELAND
Assistant Attorney General

By: /s/ William L. Brauch
WILLIAM L. BRAUCH
Assistant Attorney General

ATTORNEYS FOR THE PLAINTIFF
Consumer Protection Division
1300 East Walnut,
Hoover Bldg.
Des Moines, IA 50319
Phone: (515) 281-5926

APPENDIX I

IN THE IOWA DISTRICT COURT
FOR POTTAWATTAMIE COUNTY

THE STATE OF IOWA ex rel. THOMAS J. MILLER, ATTORNEY GENERAL OF IOWA, Plaintiff, v. JOHN MARKEL, INC., d/b/a MARKEL FORD, and TIMOTHY S. MARKEL, in his corporate capacity as President of John Markel, Inc., Defendants.	EQUITY NO. 58535 **PETITION** (Filed Sept. 4, 1987)

COMES NOW the Plaintiff, the State of Iowa, by Thomas J. Miller, Attorney General of the State of Iowa, and William L. Brauch, Assistant Attorney General, and for its cause of action states:

I.

1. The Plaintiff, the State of Iowa ex rel. Thomas J. Miller, Attorney General of Iowa, is empowered pursuant to the *Iowa Consumer Fraud Act*, Iowa Code § 714.16, H.F. 416, 72 G.A., 1st Sess. (Iowa 1987) (hereinafter referred to as Iowa Code § 714.16 (1987) as amended) and the *Iowa Consumer Credit Code*, Iowa Code §§ 537.6104(2), 537.6110,

537.6112, and 537. 6113 (1987) to initiate this action seeking injunctive relief, a civil penalty, restitution and recovery of costs for the use of the State, including court costs.

2. The Attorney General is the Administrator of the Iowa Consumer Credit Code, Iowa Code § 537.6103 (1987), and in this capacity may enforce the federal Truth-In-Lending Act, 15 U.S.C. § 1601, et seq. (hereinafter referred to as the federal Truth-In-Lending Act) to the fullest extent of the law. Iowa Code § 537.6104(2) (1987).

3. Thomas J. Miller is the duly elected, qualified, and acting Attorney General of the State of Iowa.

4. John H. Markel, Jr. is the registered agent for service of process on the Defendants with a business address of 716 North 102nd Street, Omaha, Nebraska 68114. Defendant Timothy S. Markel is the president of John Markel, Inc.

5. Defendant John Markel, Inc. is an Omaha, Nebraska corporation whose principal place of business is 716 North 102nd Street, Omaha, Nebraska 68114.

6. The term Defendants shall refer to both Defendant John Markel, Inc. and Defendant Timothy S. Markel unless otherwise specifically designated.

II.

7. The Iowa District Court has jurisdiction of this action pursuant to Iowa Code §§ 537.1201(1)(c), 537.1203, 537.6104(2) (1987), and § 714.16(7) as amended.

8. Defendants have offered motor vehicles for sale or lease to Iowans through advertisements in the Iowa

edition of the Omaha World Herald which is a newspaper sold, distributed, and delivered to Iowans in Iowa.

9. On information and belief, Iowans have purchased or leased motor vehicles for their use in Iowa from the Defendants based on these advertisements.

10. Defendants' advertisements are governed by the Iowa Consumer Credit Code, Iowa Code §§ 537.3209, 537.6104(2) (1987); the federal Truth-In-Lending Act, 15 U.S.C. §§ 1662, 1664 and 1667c (1987), and its implementing regulations 12 C.F.R. § 226.24 (1987), 12 C.F.R. § 213.5 (1987); and the Iowa Consumer Fraud Act, Iowa Code § 714.16(2)(a) (1987) as amended.

11. Iowa Code § 537.3209 (1987), the Iowa Consumer Credit Code provides as follows:

> A seller, lessor, or lender shall not advertise, display, publish, distribute, utter, or broadcast, or cause to be advertised, printed, displayed, published, distributed, uttered, or broadcast in any manner, any false, misleading, or deceptive statement or representation with regard to the rates, terms or conditions of credit with respect to a consumer credit transaction.

12. Incorporated in the Iowa Consumer Credit Code, the federal Truth-In-Lending Act, and regulations promulgated thereunder, specifically 12 C.F.R. § 226.24(a)-(c), and Comment 1, § 226.24 (1987) provides, in general, that all advertisements of credit terms are subject to a "clear and conspicuous" standard. In particular § 226.24(a)-(c) provides:

> (a) If an advertisement for credit states specific credit terms, it shall state only those terms that

actually are or will be arranged or offered by the creditor.

(b) If an advertisement states a rate of finance charge, it shall state the rate as an "annual percentage rate," using that term. If the annual percentage rate may be increased after consummation, the advertisement shall state that fact. The advertisement shall not state any other rate, except that a simple annual rate or periodic rate that is applied to an unpaid balance may be stated in conjunction with, but not more conspicuously than, the annual percentage rate.

(c) If an advertisement states the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, the advertisement must also state the following terms:

i. The amount or percentage of the downpayment.

ii. The terms of repayment.

iii. The "annual percentage rate," using that term, and, if the rate may be increased after consummation, that fact.

and 12 C.F.R. § 213.5(a) and (c) (1987) provide:

(a) No advertisement to aid, promote or assist directly or indirectly any consumer lease may state that a specific lease of any property at specific amounts or terms is available unless the lessor usually and customarily leases or will lease such property at those amounts or terms.

* * *

(c) If an advertisement for a consumer lease states the amount of any payment, the number of required payments, or that any or no downpayment is required at consummation of the

lease, the advertisement must also clearly and conspicuously state:

i. that the transaction advertised is a lease.

ii. The total amount of any payment such as a security deposit required at the consummation of the lease or that no such payment is required.

iii. A payment schedule, including the number and amounts of scheduled payments as well as the total of payments.

iv. A statement of whether the customer has the option to purchase the leased property, and at what price and time.

v. A statement about the amount of any liability the lease imposes upon the customer at the end of the term.

13. Iowa Code Section 714.16(2)(a) (1987) as amended provides as follows:

> The act, use or employment by a person of an unfair practice, deception, fraud, false pretense, false promise, or misrepresentation, or the concealment, suppression, or omission of a material fact with intent that others rely upon the concealment, suppression, or omission, in connection with the lease, sale, or advertisement of any merchandise, whether or not a person has in fact been misled, deceived, or damaged, is an unlawful practice.

III.

14. Defendants were advised by the Plaintiff by certified letter on or about November 26, 1986, that certain of their advertisements violated both the federal Truth-In-Lending Act consumer credit advertising provisions,

as incorporated in the Iowa Consumer Credit Code, and the Iowa Consumer Fraud Act. Defendant Timothy S. Markel acknowledged receipt of this letter, with a reply letter dated December 12, 1986, however, Defendant Markel did not sign and return to Plaintiff a proposed agreement that Defendant acknowledge the violations and promise to correct future advertisements. A copy of the November letters and Defendant's reply are attached to this Petition as Exhibits A and B.

IV.

15. Defendants in their Omaha World Herald advertisements have violated Iowa Code Section 714.16(2)(a) (1987) as amended, by using deception, unfair practices, or misrepresentation or having concealed, suppressed, or omitted material facts with intent that others rely upon such concealment, suppression, or omission in connection with the advertisement for sale of motor vehicles including, but not limited to, the following specifics:

(a) On July 11, 1987, the Defendants violated Iowa Code § 714.16(2)(a) in their advertisement in the Omaha World Herald by advertising "1986 Lincoln town Cars" at "One Low Price" of $14,982, but omitting a disclosure that the vehicles were not new vehicles. (*See* Exhibit 1).

(b) On July 3 and 5, 1987, the Defendants violated Iowa Code § 714.16(2)(a) by stating in their July 3, 1987 advertisement in the Omaha World Herald that their "4th of July Blowout" sale would last for "2 days only," and then extending the sale another two days in their July 5, 1987 advertisement in the Omaha World Herald. (*See* Exhibits 2 and 3).

(c) On May 2, 23 and 30, 1987 and June 20 and 21, 1987, the Defendants violated Iowa Code § 714.16(2)(a) by stating in their advertisements in the Omaha World Herald that buyers would "Save Over $3,000" on a 1987 Ford F-150 Truck at the advertised price of $9,990. Defendants did not provide the basis for this savings in their advertisements. (*See* Exhibits 4, 5, 6, and 7).

(d) On June 20 and 24, 1987, the Defendants violated Iowa Code § 714.16(2)(a) by stating in their advertisements in the Omaha World Herald that buyers would save either $1,500 or $2,000 on specific 1984 and 1985 vehicles under prices the buyer "will pay this fall" without providing a basis for buyers to ascertain what the Defendants meant when they stated, "under prices you will pay this fall." (*See* Exhibits 8 and 9).

(e) On July 11 and 12, 1987, Defendants violated Iowa Code § 714.16(2)(a) by stating in their advertisements in the Omaha World Herald that buyers would save either $2,500 or $3,500 on the advertised vehicles, but did not provide a basis for this savings in their advertisements. (*See* Exhibits 10, 11, and 12).

(f) On May 9 and 23, 1987, Defendants' advertisements in the Omaha World Herald violated Iowa Code § 714.16(2)(a) by offering a "Five Star Vacation Week-End" on "Every '87 Taurus & F-150 Truck in Stock." Defendants' advertisements served to bait consumers into purchasing these vehicles from Defendants by failing to disclose that the cost of the vacations were included in the sale prices of the vehicles, based upon Plaintiff's information and belief. (*See* Exhibits 27 and 28).

(g) On May 30, 1987 and June 6, 20 and 27, 1987, Defendants' advertisements in the Omaha World Herald violated Iowa Code § 714.16(2)(a)

by stating that a sale of 1986 Thunderbirds would last for two days only in its May 30 and June 6, 1987 advertisements. (*See* Exhibits 16, 17, 18 and 19).

16. Defendants have violated Iowa Code Section 537.3209, 12 C.F.R. § 226.24, and 12 C.F.R. § 213.5 by making misleading representations of credit terms and by omitting mandatory terms of credit in their advertisements for sale or lease of motor vehicles including, but not limited to, the following specifics:

(a) On May 2, 9, 10, 16 and 30, 1987 and June 6, 20 and 27, 1987, Defendants, in their advertisements in the Omaha World Herald, stated the amount of down payment on advertised vehicles, but did not state the terms of repayment and the annual percentage rate or the abbreviation A.P.R. in violation of 12 C.F.R. § 226.24(c)(2)(ii)(iii). (*See* Exhibits 13-19).

(b) On January 17, 29 and 31, 1987, March 19, 21 and 22, 1987, April 4, 1987, and July 12, 1987, Defendants, in their advertisements in the Omaha World Herald, specified the periods of repayment for advertised vehicles, but failed to disclose the amount or percentage of downpayment and the terms of repayment in violation of 12 C.F.R. § 226.24(c)(2)(i)(ii). (*See* Exhibits 20-25).

(c) On February 5, 1987 and May 9 and 23, 1987, Defendants, in their advertisements in the Omaha World Herald, violated the requirements of 12 C.F.R. §213.5(c)(2). On February 5, 1987, Defendants advertised a 1987 Ford Tempo for lease and stated the amount of monthly payment, but failed to include the total amount of any payment such as a security deposit or capitalized cost reduction required at the consummation of the lease, or that no such payments

are required. On May 9, 1987, Defendants advertised autos and trucks for lease with "No Money Down," but stated in small type that the first month's payment and a security deposit were due on delivery. On May 23, 1987, Defendants advertised Ford Tempos and Taurus for lease but failed to include the total amount of any payment such as a security deposit or capitalized cost reduction required at the consummation of the lease, or that no such payments were required. (*See* Exhibits 26, 27, and 28).

(d) On January 17, 18 and 31, 1987 February 5, 1987, March 17, 1987, May 9 and 23, 1987, and June 13, 1987, Defendants violated 12 C.F.R. § 213.5(c)(3) in their advertisements in the Omaha World Herald. Defendants advertised the amount of monthly lease payments, but failed to include the total of payments due under the leases. (*See* Exhibits 29, 26, 27, 28, and 30).

(e) On January 17, 18 and 31, 1987, February 5, 1987, March 14, 1987, May 9 and 23, 1987, and June 13, 1987, Defendants violated 12 C.F.R. § 213.5(c)(4) in their advertisements in the Omaha World Herald by advertising the amount of monthly lease payments, but failing to include a statement of whether or not the leasee has the option to purchase the leased property and at what price and time. (*See* Exhibits 29, 26, 31, 27, 28, and 30).

(f) On January 17, 18 and 31, 1987, February 5, 1987, March 14, 1987, May 9 and 23, 1987 and June 13, 1987, Defendants violated 12 C.F.R. § 213.5(c)(5) in their advertisements in the Omaha World Herald by advertising the amount of monthly lease payments, but failing to include a statement of the amount or method of determining the amount of any liabilities the leases would impose upon the lessees [sic] at the

end of the lease terms and a statement that the leasee shall be liable for the difference, if any, between the estimated value of the leased property and its realized value at the end of the lease term, if the leasee has such liability. (*See* Exhibits 29, 26, 31, 27, 28 and 30).

(g) On January 17, 18 and 31, 1987, Defendants violated 12 C.F.R. § 213.5(c)(1), in their advertisements in the Omaha World Herald by stating the amount of payment, but did not clearly and conspicuously indicate in the advertisement that the vehicle was offered under a lease, and in fact misrepresented the transaction as a "Specially Reduced Monthly Payment Plan." (*See* Exhibit 29).

(h) On July 5, 1987, Defendants in their advertisement in the Omaha World Herald, stated that advertised vehicles would be sold at 3.9% financing. However, Defendants failed to state that this rate was an annual percentage rate in violation of 12 C.F.R. 226.24(b). (*See* Exhibit 3).

17. The representations set forth in paragraph 16 above are deceptive and misleading, and therefore also violate the Iowa Consumer Fraud Act, Iowa Code § 714.16(2)(a) (1987) as amended.

V. PRAYER FOR RELIEF

18. It is in the public interest that temporary and permanent injunctive relief be promptly issued to protect the public of the State of Iowa from any further losses from Defendants' illegal conduct.

19. This petition for injunctive relief has not been presented to, or denied, by any other judge of the district court.

20. The State of Iowa is exempt from furnishing bond by the provisions of Iowa R. Civ. P. 9.

WHEREFORE, the Plaintiff prays for relief against the Defendants as follows:

21. After notice and opportunity for hearing, the Court should issue a temporary injunction restraining Defendants from:

(a) advertising, offering for sale or lease, attempting to sell or lease or selling or leasing any goods in violation of 12 C.F.R. § 226.24 and 12 C.F.R. § 213.5 as incorporated in Iowa Code chapter 537, and

(b) advertising motor vehicles through the use of any deception, unfair practices or misrepresentations and specifically enjoining Defendants from engaging in practices in violation of the laws of the State of Iowa, and federal law as incorporated, as set forth in this Petition.

22. The Court should permanently enjoin Defendants from:

(a) advertising, offering for sale or lease, attempting to sell or lease or selling or leasing any goods in violation of 12 C.F.R. § 226.24 and 12 C.F.R. § 213.5 as incorporated in Iowa Code chapter 537, and

(b) advertising motor vehicles through the use of any deception, unfair practices or misrepresentations and specifically enjoining Defendants from engaging in practices in violation of the laws of the State of Iowa, and federal law as incorporated, as set forth in this Petition.

23. Order Defendants to pay restitution to Iowans of any money that was acquired by means of any practices referred to above in violation of the Iowa Consumer Fraud Act, Iowa Code § 714.16, as amended.

24. Order Defendants to pay a civil penalty pursuant to Iowa Code § 537.6113(2) (1987) and a civil penalty pursuant to Iowa Code § 714.16(7), as amended.

25. Order Defendants to pay the state its costs pursuant to Iowa Code §§ 714.16(10), as amended, and 537.6106(1) (1987).

26. Order Defendants to pay all court costs.

27. Grant such further relief as the Court may deem just and equitable.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

RICHARD L. CLELAND
Assistant Attorney General

By: /s/ William L. Brauch
WILLIAM L. BRUACH
Assistant Attorney General

ATTORNEYS FOR THE
PLAINTIFF
Consumer Protection Division
1300 East Walnut,
Hoover Bldg.
Des Moines, IA 50319
Phone: (515) 281-5926

APPENDIX J

IN THE IOWA DISTRICT COURT FOR
POTTAWATTAMIE COUNTY

THE STATE OF IOWA ex rel. THOMAS J. MILLER, ATTORNEY GENERAL OF IOWA, Plaintiff, v. STAN OLSEN PONTIAC, INC. d/b/a OLSEN AUTO WORLD and OLSEN FAMILY DISCOUNT CENTER; METROPOLITAN LINCOLN-MERCURY, INC. d/b/a Olsen Auto World, Olsen Family Discount Center, and Metro Motors, OLSEN DODGE, INC. d/b/a Olsen Family Discount Center and Olsen Auto World, STANLEY OLSEN in his corporate capacity as President of Metropolitan Lincoln-Mercury, Inc., and Stan Olsen Pontiac, Inc., and RONALD OLSEN in his corporate capacity as President of Olsen Dodge, Inc., Defendants.	EQUITY NO. 58537 PETITION (Filed Sept. 4, 1987)

COMES NOW the plaintiff, the State of Iowa, by Thomas J. Miller, Attorney General of the State of Iowa,

and William L. Brauch, Assistant Attorney General, and for its cause of action states:

I.

1. The plaintiff, the State of Iowa ex rel. Thomas J. Miller, Attorney General of Iowa, is empowered pursuant to the Iowa Consumer Fraud Act, Iowa Code § 714.16, H.F. 416, 72 G.A., 1st Sess. (Iowa 1987) (hereinafter referred to as Iowa Code § 714.16 (1987) as amended) and the Iowa Consumer Credit Code, Iowa Code §§ 537.6104(2), 537.6110, 537.6112, and 537.6113 (1987) to initiate this action seeking injunctive relief, a civil penalty, restitution and recovery of costs for the use of the State, including court costs.

2. The Attorney General is the Administrator of the Iowa Consumer Credit Code, Iowa code § 537.6103 (1987), and in this capacity may enforce the federal Truth-In-Lending Act 15 U.S.C. § 1601, et seq. (hereinafter referred to as the federal Truth-In-Lending Act) to the fullest extent of the law. Iowa Code § 537.6104(2) (1987).

3. Thomas J. Miller is the duly elected, qualified and acting Attorney General of the State of Iowa.

4. Defendant Stan Olsen Pontiac, Inc. d/b/a/ Olsen Auto World and Olsen Family Discount Center is an Omaha corporation whose principal place of business is 808 North 102nd, Omaha, Nebraska 68114.

5. Defendant Metropolitan Lincoln-Mercury, Inc. d/b/a/ Olsen auto world, Olsen Family Discount Center,

and Metro Motors is an Omaha corporation whose principal place of business is 908 North 102nd, Omaha, Nebraska 68114.

6. Defendant Olsen Dodge, Inc. d/b/a Olsen Family Discount Center and Olsen Auto World, is an Omaha corporation whose principal place of business is 1010 North 102nd, Omaha, Nebraska 68114.

7. Defendant Stanley Olsen is the President of Metropolitan Lincoln-Mercury, Inc. and of Stan Olsen Pontiac, Inc.

8. Defendant Ronald Olsen is the President of Olsen Dodge, Inc.

9. The term defendants shall refer to Stan Olsen Pontiac, Inc.; Metropolitan Lincoln-Mercury d/b/a Metro Motors; Olsen Dodge, Inc. (all d/b/a Olsen Auto World and Olsen Family Discount Center); Ronald Olsen; and Stanley Olsen unless otherwise specifically designated.

II.

10. The Iowa District Court has jurisdiction of this action pursuant to Iowa Code §§ 537.1201(1)(c), 537.1203, 537.6104(2) (1987), and § 714.16(7) as amended.

11. Defendants have offered motor vehicles for sale or lease to Iowans through advertisements in the Iowa Edition of the Omaha World-Herald which is a newspaper sold, distributed, and delivered to Iowans in Iowa.

12. On information and belief, Iowans have purchased or leased motor vehicles for their use in Iowa from the defendants based on these advertisements.

13. Defendants' advertisements are governed by the Iowa Consumer Credit Code, Iowa Code §§ 537.3209, 537.6104(2) (1987); the federal Truth-In-Lending Act, 15 U.S.C. §§ 1662, 1664 and 1667c (1987), and its implementing regulations 12 C.F.R. § 226.24 (1987); 12 C.F.R. § 215.5 (1987); and the Iowa Consumer Fraud Act, Iowa Code § 714.16(2)(a) (1987) as amended.

14. Iowa Code § 537.3209 (1987), the Iowa Consumer Credit Code provides as follows:

> A seller, lessor, or lender shall not advertise, display, publish, distribute, utter, or broadcast, or cause to be advertised, printed, displayed, published, distributed, uttered, or broadcast in any manner, any false, misleading, or deceptive statement or representation with regard to the rates, terms or conditions of credit with respect to a consumer credit transaction.

15. Incorporated in the Iowa Consumer Credit Code, the federal Truth-In-Lending Act, and regulations promulgated thereunder, specifically 12 C.F.R. § 226.24(a)-(c), and Comment 1, § 226.24 (1987) provides, in general, that all advertisements of credit terms are subject to a "clear and conspicuous" standard. In particular, § 226.24(a)-(c) provides:

> (a) If an advertisement for credit states specific credit terms, it shall state only those terms that actually are or will be arranged or offered by the creditor.
>
> (b) If an advertisement states a rate of finance charge, it shall state the rate as an "annual percentage rate," using that term. If the annual percentage rate may be increased after consummation, the advertisement shall state that fact. The advertisement shall not state any other rate,

except that a simple annual rate or periodic rate that is applied to an unpaid balance may be stated in conjunction with, but not more conspicuously than, the annual percentage rate.

(c) If an advertisement states the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, the advertisement must also state the following terms:

i. The amount or percentage of the downpayment.

ii. The terms of repayment.

iii. The "annual percentage rate," using that term, and, if the rate may be increased after consummation, that fact.

and 12 C.F.R. § 213.5(a) and (c) (1987) provide:

(a) No advertisement to aid, promote or assist directly or indirectly any consumer lease may state that a specific lease of any property at specific amounts or terms is available unless the lessor usually and customarily leases or will lease such property at those amounts or terms.

* * *

(c) If an advertisement for a consumer lease states the amount of any payment, the number of required payments, or that any or no downpayment is required at consummation of the lease, the advertisement must also clearly and conspicuously state:

i. That the transaction advertised is a lease.

ii. The total amount of any payment such as a security deposit required at the consummation of the lease or that no such payment is required.

iii. A payment schedule.

iv. A statement of whether the customer has the option to purchase the leased property.

v. A statement about the amount of any liability the lease imposes upon the customer at the end of the term.

16. Iowa Code Section 714.16(2)(a) (1987) as amended provides as follows:

> The act, use or employment by a person of an unfair practice, deception, fraud, false pretense, false promise, or misrepresentation, or the concealment, suppression, or omission of a material fact with intent that others rely upon the concealment, suppression, or omission, in connection with the lease, sale, or advertisement of any merchandise, whether or not a person has in fact been misled, deceived, or damaged, is an unlawful practice.

III.

17. Defendants Stan Olsen's Metro Motors and Ron Olsen Dodge were advised by the plaintiff by certified letter on or about November 26, 1986, that certain of their advertisements violated the federal Truth-In-Lending Act consumer advertising provisions, as incorporated in the Iowa Consumer Credit Code and/or the Iowa Consumer Fraud Act. Defendants Ronald Olsen and Stanley Olsen each acknowledged receipt of these letters on December 11, 1986 and December 12, 1986, respectively. However, neither defendant Ronald Olsen, nor defendant Stanley Olsen signed and returned to plaintiff proposed agreements that defendants acknowledge the violations and promise to correct future advertisements. Copies of the

November letters and defendant Ronald Olsen's and defendant Stanley Olsen's replies are attached to this Petition as Exhibits A, B, C and D.

IV.

18. Defendants in their Omaha World-Herald (Iowa Edition) advertisements have violated Iowa Code Section 714.16(2)(a) (1987) as amended, by using deception, unfair practices, or misrepresentation or having concealed, suppressed, or omitted material facts with intent that others rely upon such concealment, suppression, or omission in connection with the advertisement for sale of motor vehicles including, but not limited to, the following specifics:

a) On June 13, 14, 18, 20 and 27, 1987 and July 2 and 5, 1987, defendant Olsen Dodge, Inc. violated Iowa Code § 714.16(2)(a) in its motor vehicle advertisements in the Omaha World Herald by using the phrase "UNDER INVOICE" without also clearly and conspicuously stating that the invoice price does not necessarily reflect the actual cost of the vehicle to the dealer. (*See* Exhibits 1-7).

b) On June 13 and 14, 1987 and July 2, 5, 9, 11 and 12, 1987, defendants violated Iowa Code § 714.16(2)(a) in their advertisements in the Omaha World Herald by not giving reasonable bases for the advertised discounts. (*See* Exhibits 1, 6, 7, 8, 9, 10 and 11).

c) On July 2 and 9, 1987, defendants violated Iowa Code § 714.16(2)(a) in their advertisements in the Omaha World Herald by advertising a three day sale on July 2 and then advertising essentially the same "sale" on July 9, 1987. (*See* Exhibits 6 and 12).

d) On August 13, 1987, defendant Olsen Dodge, Inc. violated Iowa Code § 714.16(2)(a) in its advertisement in the Omaha World Herald by stating that "$99 DELIVERS" on seven different types of vehicles listed, but then, immediately below that statement advertised some of the same types of vehicles, listing monthly payment amounts. This advertisement was misleading in that the "$99 DELIVERS" offer was not available for the autos listed in the advertisement with monthly payment amounts disclosed.

Furthermore, defendant Olsen Dodge failed to reveal in a conspicuous manner that the vehicles advertised with monthly payment amounts were offered under a lease. Thus, the advertisement was misleading and violated Iowa Code § 714.16(2)(a). (*See* Exhibit 33).

19. Defendants have violated Iowa Code Section 537.3209, C.F.R. § 226.24, and 12 C.F.R. § 213.5 by making misleading representations and by omitting mandatory terms of credit in their advertisements for sale or lease of motor vehicles including, but not limited to, the following specifics:

a) On May 23, 25, 28, 30 and 31, 1987 and June 4 and 6, 1987, defendants' advertisements in the Omaha World Herald stated the amounts of downpayment for advertised vehicles, but omitted to include complete terms of repayment or the annual percentage rate in violation of 12 C.F.R. § 226.24(c)(2)(ii) and (iii). (*See* Exhibit 13).

b) On February 7, 1987, defendant Metropolitan Lincoln-Mercury, Inc., in their advertisement in the Omaha World Herald, stated

the amount of the monthly payments for a 1987 Topaz and a 1987 Lynx but did not include the amount of the downpayment in violation of 12 C.F.R. § 226.24(c)(2)(ii). (*See* Exhibit 14).

c) On March 15, 19, 23, 26 and 28, 1987, April 30, 1987, May 2, 3, 9, 10, 16, 17, 23, 24, 30 and 31, 1987, and June 6, 7 and 13, 1987, defendants stated the amounts of monthly payments for vehicles in their advertisements in the Omaha World Herald, but did not clearly and conspicuously indicate that the vehicles were offered under a lease in violation of 12 C.F.R. § 213.5(c)(1). (*See* Exhibit 15-29).

d) On May 2, 3, 9, 10, 16, 17, 23, 24, 30 and 31, 1987, and June 6, 7 and 13, 1987, defendants stated the amounts of monthly payments for advertised lease vehicles in their Omaha World Herald advertisements, but did not disclose the total of such payments under the lease in violation of 12 C.F.R. § 213.5(c)(3). (*See* Exhibits 21-29).

e) On January 17, 1987, March 15, 19, 23, 26 and 28, 1987, April 30, 1987, May 2, 3, 9, 10, 16, 17, 23, 24, 30 and 31, 1987, and June 6, 7 and 15, 1987, defendants stated the amounts of monthly payments for advertised lease vehicles in their Omaha World Herald advertisements, but did not include a statement of whether the lessee [sic] has the option to purchase the leased auto, and at what price and time in violation of 12 C.F.R. § 213.5(c)(4). (*See* Exhibits 30, 15-29).

f) On January 17, 31, 1987, February 1, 7 and 8, 1987, May 2, 3, 9, 10, 16, 17, 23, 24, 30 and 31, 1987, and June 6, 7 and 13, 1987, defendants stated the amounts of monthly payments for advertised lease vehicles in their

Omaha World Herald advertisements, but did not include a statement of the amount/ method of determining the amount of any liability the lease imposes upon the lessee in violation of 12 C.F.R. § 213.5(c)(5). (*See* Exhibits 30, 31, 21-29).

g) On or about July 22, 1987, sales agents for defendants Olsen Dodge, Inc. gave potential buyer a brochure which stated the number of payments required for certain annual percentage rates but did not include the amounts of downpayments or the terms of repayment in violation of 12 C.F.R. § 226.24(c)(2)(i) and (ii). (*See* Exhibit 32).

h) On August 13, 1987, defendant Olsen Dodge, Inc. violated 12 C.F.R. § 213.5(c)(1) in its advertisement in the Omaha World Herald by omitting to clearly and conspicuously disclose that the advertised vehicles were offered under a lease. (*See* Exhibit 33).

20. The representations set forth in paragraph 19 above deceptive and misleading, and therefore also violate the Iowa Consumer Fraud Act, Iowa Code § 714.16(2)(a) (1987) as amended.

V. PRAYER FOR RELIEF

21. It is in the public interest that temporary and permanent injunctive relief be promptly issued to protect the people of the State of Iowa from any further losses from defendants illegal conduct.

22. This petition for injunctive relief has not been presented to, or denied, by any other judge of the district court.

23. The State of Iowa is exempt from furnishing bond by the provisions of Iowa R. Civ. P. 9.

WHEREFORE, the Plaintiff prays for relief against the defendants as follows:

24. After notice and opportunity for hearing, the Court should issue a temporary injunction restraining defendants from:

(a) advertising, offering for sale or lease, attempting to sell or lease or selling or leasing any goods in violation of 12 C.F.R. § 226.24 and 12 C.F.R. § 213.5 as incorporated in Iowa Code chapter 537, and

(b) advertising motor vehicles through the use of any deception, unfair practices or misrepresentations and specifically enjoining defendants from engaging in practices in violation of the laws of the State of Iowa, and federal law as incorporated, as set forth in this Petition.

25. The Court should permanently enjoin defendants from:

(a) advertising, offering for sale or lease, attempting to sell or lease or selling or leasing any goods in violation of 12 C.F.R. § 226.24 and 12 C.F.R. § 213.5 as incorporated in Iowa Code chapter 537, and

(b) advertising motor vehicles through the use of any deception, unfair practices or misrepresentations and specifically enjoining defendants from engaging in practices in violation of the laws of the State of Iowa, and federal law as incorporated, as set forth in this Petition.

26. Order defendants to pay restitution to Iowans of any money that was acquired by means of any practices

referred to above in violation of the Iowa Consumer Fraud Act, Iowa Code § 714.16, as amended.

27. Order defendants to pay a civil penalty pursuant to Iowa Code § 537.6113(2) (1987) and a civil penalty pursuant to Iowa Code § 714.16(7), as amended.

28. Order defendants to pay the state its costs pursuant to Iowa code §§ 714.16(10), as amended, and 537.6106(1) (1987).

29. Order defendants to pay all court costs.

30. Grant such further relief as the Court may deem just and equitable.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

RICHARD L. CLELAND
Assistant Attorney General

/s/ William L. Brauch
WILLIAM L. BRAUCH
Assistant Attorney General

ATTORNEYS FOR THE PLAINTIFF
Consumer Protection Division
1300 East Walnut,
Hoover Bldg.
Des Moines, IA 50319
Phone: (515) 281-5926

APPENDIX K

AFFIDAVIT

STATE OF IOWA)
) ss:
COUNTY OF POLK)

I, Nancy Dudak, am a Consumer Protection Investigator for the plaintiff State of Iowa. Being first duly sworn, under oath I do state and depose that the following is true to the best of my knowledge and belief.

On December 14, 1987, I spoke by phone with Tom Kildee of the *Omaha World Herald*, telephone 402-444-1000, and received the following information:

1. The City of Council Bluffs has 5,700 Sunday *Omaha World Herald* and 3,700 daily *Omaha World Herald* home delivered subscriptions. This does not include all of Pottawattamie County, only the City of Council Bluffs, Iowa.

2. There are 133,000 Sunday and 106,00 [sic] daily subscriptions for all Metro home deliveries. (Metro refers to Douglas, Sarpy and Pottawattamie counties).

3. There are 164,000 Sunday and 135,000 daily all Metro papers circulated.

On December 14, 1987 I reviewed an edition of the Sunday *Omaha World Herald* (Iowa Edition) and I found 10 pages of automobile advertisements. On December 14, 1987, I spoke by phone with Ed McGrath of the *Council Bluffs Non Pariel*, telephone 712-328-7811, and found that they deliver 13,263 daily home subscriptions and 15,045

Sunday home subscriptions. An average Sunday newspaper contains 7½ pages of classified ads and less than one page of those are automobile ads, according to Mr. McGrath.

On December 15, 1987, I spoke with a woman from the Council Bluffs Chamber of Commerce, telephone 712-325-1000, and was told that there are approximately 21,060 households in the city of Council Bluffs.

I have also reviewed the May 1987/1988 U.S. West Direct Yellow Pages Directory for Council Bluffs, Iowa, and found that of the 27 new car automobile dealer listings in large block advertisements and in single lines, 14 are located in Nebraska and 13 are located in Iowa. All defendants are included in the group of single line listings. In addition, Baxter Chrysler-Plymouth and Olsen's Auto World have large block advertisements in the U.S. West Direct Yellow Pages.

From July, 1987 until August, 1988, one of my job duties was to monitor automobile advertising in the daily and Sunday *Omaha World Herald* for compliance with Iowa Code Section 714.16 (1987) and Iowa Code Chapter 537 (1987). During this monitoring I observed almost daily advertisements by: John Kraft Chevrolet-Isuzu of Omaha, Nebraska; Markel Ford of Omaha, Nebraska; Olsen Auto World of Omaha, Nebraska; Olsen Family Discount of Omaha, Nebraska; Metro Motors of Omaha, Nebraska; Dean Rawson Nissan of Omaha, Nebraska; and Baxter Chrysler-Plymouth of Omaha, Nebraska.

Further, afffiant [sic] sayeth not.

/s/ Nancy Dudak
NANCY DUDAK

Subscribed and sworn to before me this 30th day of January, 1989.

/s/ Melissa J. Miller
NOTARY PUBLIC

MELISSA J. MILLER
MY COMMISSION EXPIRES
October 16, 1989

APPENDIX L

§ 1640. Civil liability

individual or class action for damages; amount of award; factors determining amount of award

(a) Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part, including any requirement under section 1635 of this title, or part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of–

(1) any actual damage sustained by such person as a result of the failure;

(2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000; or

(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor; and

(3) in the case of any successful action to enforce the foregoing liability or in any action in which a person is determined to have a right of rescission under section 1635 of this title, the costs of the action, together with a reasonable attorney's fee as determined by the court.

In determining the amount of award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional. In connection with the disclosures referred to in section 1637 of this title, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 1635, section 1637(a), or of paragraph (4), (5), (6), (7), (8), (9), or (10) of section 1637(b) of this title or for failing to comply with disclosure requirements under State law for any term or item which the Board has determined to be substantially the same in meaning under section 1610(a)(2) of this title as any of the terms or items referred to in section 1637(a) of this title or any of those paragraphs of section 1637(b) of this title. In connection with the disclosures referred to in section 1638 of this title, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 1635 of this title or of paragraph (2) (insofar as it requires a disclosure of the "amount financed"), (3), (4), (5), (6), or (9) of section 1638 (a) of this title, or for failing to comply with disclosure requirements under State law for any term which the Board has determined to be substantially the same in meaning under section 1610(a)(2) of this title as any of the terms referred to in any of those paragraphs of section 1638(a) of this title. With respect to any failure to make disclosures required under this part or part D or E of this

subchapter, liability shall be imposed only upon the creditor required to make disclosure, except as provided in section 1641 of this title.

Correction of errors

(b) A creditor or assignee has no liability under this section or section 1607 of this title or section 1611 of this title for any failure to comply with any requirement imposed under this part or part E of this subchapter, if within sixty days after discovering an error, whether pursuant to final written examination report or notice issued under section 1607(e)(1) of this title or through the creditor's or assignee's own procedures, and prior to the institution of an action under this section or the receipt of written notice of the error from the obligor, the creditor or assignee notifies the person concerned of the error and makes whatever adjustments in the appropriate account are necessary to assure that the person will not be required to pay an amount in excess of the charge actually disclosed, or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower.

Unintentional violations; bona fide errors

(c) A creditor or assignee may not be held liable in any action brought under this section or section 1635 of this title for a violation of this subchapter if the creditor or assignee shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. Examples of a bona fide error include, but are not limited

to, clerical, calculation, computer malfunction and programming, and printing errors, except that an error of legal judgment with respect to a person's obligations under this subchapter is not a bona fide error.

Liability in transaction or lease involving multiple obligors

(d) When there are multiple obligors in a consumer credit transaction or consumer lease, there shall be no more than one recovery of damages under subsection (a)(2) of this section for a violation of this subchapter.

Jurisdiction of courts; limitations on actions

(e) Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation. This subsection does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law.

Good faith compliance with rule, regulation, or interpretation of Board or with interpretation or approval of duly authorized official or employee of Federal Reserve System

(f) No provision of this section, section 1607(b), section 1607(c), section 1607(e), or section 1611 of this title imposing any liability shall apply to any act done or

omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

Recovery for multiple failures to disclose

(g) The multiple failure to disclose to any person any information required under this part or part D or E of this subchapter to be disclosed in connection with a single account under an open end consumer credit plan, other single consumer credit sale, consumer loan, consumer lease, or other extension of consumer credit, shall entitle the person to a single recovery under this section but continued failure to disclose after a recovery has been granted shall give rise to rights to additional recoveries. This subsection does not bar any remedy permitted by section 1635 of this title.

Offset from amount owed to creditor or assignee; rights of defaulting consumer

(h) A person may not take any action to offset any amount for which a creditor or assignee is potentially liable to such person under subsection (a) (2) of this section against any amount owed by such person, unless the amount of the creditor's or assignee's liability under

this subchapter has been determined by judgment of a court of competent jurisdiction in an action of which such person was a party. This subsection does not bar a consumer then in default on the obligation from asserting a violation of this subchapter as an original action, or as a defense or counterclaim to an action to collect amounts owned by the consumer brought by a person liable under this subchapter.

(Pub.L. 90-321, Title I, § 130, May 29, 1968, 82 Stat. 157; Pub.L. 93-495, Title IV, §§ 406, 407, 408(a)-(d), Oct. 28, 1974, 88 Stat. 1518; Pub.L. 94-222, § 3(b), Feb. 27, 1976, 90 Stat. 197; Pub.L. 94-240, § 4, Mar. 23, 1976, 90 Stat. 260; Pub.L. 96-221, Title VI, § 615, Mar. 31, 1980, 94 Stat. 180.)